TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 171.

CITY OF DES MOINES, APPELLANT,

vs.

DES MOINES CITY RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED AUGUST 30, 1907.

(20,840.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Bill of complaint	1	1
Exhibit A—Ordinance passed December 10, 1866	22	18
Bond on the restraining order (omitted in printing)	28	—
Marshal's receipt (" ")	29	—
Order for temporary injunction (" ")	30	—
Subpœna in chancery (" ")	31	—
Temporary injunction (" ")	34	—
Præcipe for appearance for defendant (" ")	35	—
Answer	36	23
Replication	45	29
Notice for oral testimony (omitted in printing)	46	—
Stipulation as to examiners (" ")	47	—
Notice of application for transfer to western division (omitted in printing)	49	—
Applications for transfer to western division (omitted in printing)	50	—
Præcipe for appearance of defendant	52	29

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	Original.	Print.
Notice of resistance to application for transfer to western division (omitted in printing)	53	—
Resistance to petition or application to transfer to western division (omitted in printing)	54	—
Notice of application for leave to file plea...(omitted in printing)..	58	—
Motion for leave to file plea.....(" ")..	59	—
Order transferring case to western division..(" ")..	61	—
Trial notice.....(" ")..	62	—
Motion to dismiss or continue for want of abstract (omitted in printing)	63	—
Order to postpone hearing (omitted in printing)	64	—
Notice of application for leave to amend answer	66	30
Motion for leave to amend answer	67	31
Motion to dismiss for the want of jurisdiction (omitted in printing)..	68	—
Resistance to application for leave to amend answer	69	32
Amendment to answer	71	33
Order of submission (omitted in printing)	75	—
Order filing a written opinion and for decree	76	35
Opinion	77	36
Defendant's objection to proposed decree....(omitted in printing)..	92	—
Proposed decrees.....(" ")..	96	—
Final decree, March 22, 1907.....(" ")..	100	—
Final decree, March 30, 1907	103	46
Petition for appeal	106	47
Order allowing appeal, &c.	107	48
Order enlarging time in which to make transcript (omitted in printing)	108	—
Assignment of errors	109	48
Bond on appeal	118	54
Citation and service	120	55
Clerk's certificate	121	55
Evidence for complainant	122	56
Deposition of R. N. Baylies	124	56
Notary's certificate, &c.	130	59
Stipulation as to testimony of Baylies	131	60
Interrogatories to R. N. Baylies	132	61
Stipulation as to testimony of N. W. Harris	136	63
Interrogatories to N. W. Harris	137	64
Deposition of N. W. Harris	143	67
Notary's certificate	152	72
Exhibit A—Deed of trust from Des Moines Street R. R. Co. to American Trust and Savings Bank of Chicago, October 1, 1889 (omitted in printing)..	153	—
B—Circular No. 503, offering bonds, &c. (omitted in printing)	175	—
C—Deed of trust from Des Moines City Ry. Co. to Illinois Trust and Savings Bank, August 1, 1893 (omitted in printing)	186	—
D—Circular No. 690, offering bonds, &c. (omitted in printing)	214	—
E—Circular No. 722, offering bonds, &c. (omitted in printing)	221	—

	Original.	Print.
Exhibit F—Deed of trust from Des Moines City Ry. Co. to Illinois Trust and Savings Bank, April 1, 1901 (omitted in printing)	226	—
G—Circular No. 1124, offering bonds, &c. (omitted in printing)	260	—
H—Circular No. 1291, offering bonds, &c. (omitted in printing)	264	—
I—Circular No. 1291 A, offering bonds, &c. (omitted in printing)	268	—
J—Circular No. 1353, offering bonds, &c. (omitted in printing)	272	—
K—Circular No. 1416, offering bonds, &c. (omitted in printing)	276	—
L—Circular No. 1444, offering bonds, &c. (omitted in printing)	280	—
M—Book entitled "The Revised Ordinances of 1900 of the City of Des Moines, Iowa" (omitted in printing)	284	—
Complainant's exhibits	800	73
Exhibit No. 1—Articles of incorporation of the Des Moines Street Ry. Co., October 1, 1866	802	73
No. 2—Articles of incorporation of the Des Moines and Sevastopol Street Ry. Co. (omitted in printing)	805	—
Amended and substituted articles of incorporation of the Des Moines and Sevastopol Street Ry. Co. (omitted in printing)	808	—
No. 3—Articles of incorporation of the Des Moines Broad Gauge Street Ry. Co. (omitted in printing)	812	—
No. 4—Articles of incorporation of the Des Moines Street Railroad Company (omitted in printing)	816	—
No. 5—Amendment to the articles of incorporation of the Des Moines Street Railroad Company (omitted in printing)	822	—
Amendment to the articles of incorporation of the Des Moines Street Railroad Company (omitted in printing)	826	—
Amended and substituted articles of incorporation of the Des Moines Street Railroad Company (omitted in printing)	830	—
No. 6—Articles of incorporation of the Des Moines Rapid Transit Company (omitted in printing)	839	—
No. 7—Articles of incorporation of the Des Moines Belt Line Railway Company (omitted in printing)	843	—
No. 8—Articles of incorporation of the Des Moines Electric Railway Company (omitted in printing)	850	—

	Original.	Print.
Exhibit No. 9—Articles of incorporation of the Des Moines River Line Street Railway Company (omitted in printing)	856	—
No. 10—Articles of incorporation of the Des Moines Suburban Railway Company (omitted in printing)	861	—
Amended articles of incorporation of the Des Moines Suburban Railway Company (omitted in printing)	864	—
No. 11—Articles of incorporation of the Des Moines City Railway Company (omitted in printing)	868	—
No. 12—Ordinance authorizing the construction, extension, and operation of certain passenger railways in and upon the streets of the city of Indianapolis, January 18, 1864	878	75
No. 13—Opinion of Galusha Parsons in the matter of the duration of the franchise of the Des Moines Street Railway Company	888	82
No. 14—Ordinance No. 85, to amend section 9 of ordinance No. 28	890	83
No. 15—Certified copy of record of city council, showing acceptance by Des Moines Street Railway Company	893	85
No. 16—Ordinance No. 131, to repeal section 9 of ordinance 28	894	85
No. 17—Ordinance to authorize Des Moines Street Railway Co. to use steam, horse, or other animal power	896	86
No. 18—Resolution of city council directing street railway company to make repairs	897	87
No. 19—Ordinance authorizing the construction and operation of certain street railroads in and along the streets of North Des Moines	898	87
No. 20—Resolution of the city council, June 22, 1886	905	91
No. 21—Record of city council, January 18, 1886	906	92
No. 22—Record of city council, March 22, 1886	907	92
No. 23—Record of city council, April 27, 1886	908	92
No. 24—Record of city council, April 27, 1886	909	93
No. 25—Record of city council, June 29, 1886	913	95
No. 26—Ordinance authorizing the Des Moines Broad Gauge Street Railway Co. to construct and operate street railways in the city of Des Moines, &c.	915	96
No. 27—Acceptance of foregoing ordinance	924	101
No. 28—Deed from Des Moines Street Railway Company to Des Moines Street Railroad Company, July 1, 1886	926	102
No. 29—Deed from Des Moines Street Railway Company to Des Moines Street Railroad Company, July 1, 1886	928	103
No. 30—Transfer from M. P. Turner *et al.* to the Des Moines Street Railroad Company, July 1, 1886	932	104

	Original.	Print.
Exhibit No. 31—Record of city council, July 6, 1886	934	105
No. 32—Ordinance authorizing the Broad Guage Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines	936	106
No. 33—Record of city council, July 26, 1886	943	109
No. 34—Record of city council, August 16, 1886	945	110
No. 35—Record of city council, August 17, 1886	947	110
No. 36—Record of city council, August 20, 1886	949	111
No. 37—Record of city council, September 14, 1886	951	111
No. 38—Record of city council, September 14, 1886	953	112
No. 39—Ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, adopted December 10, 1896, and amendments thereto, passed February 5, 1872	955	112
No. 40—Record of city council, September 27, 1886	962	116
No. 41—Record of city council, October 4, 1886	965	117
No. 42—Record of city council, October 4, 1886	967	118
No. 43—Record of city council, October 5, 1886	969	118
No. 44—Petition in case of Des Moines Street Railroad Co. *vs.* City of Des Moines *et al.*	972	119
No. 45—Answer in case of Des Moines Street Railroad Company *vs.* City of Des Moines *et al.*	979	123
No. 46—Record of city council, October 15, 1886	983	125
No. 47—Record of city council, October 21, 1886	986	127
No. 48—Record of city council, November 1, 1886	989	128
No. 49—Record of city council, November 1, 1886	991	128
No. 50—Record of city council, November 23, 1886	993	129
No. 51—Record of city council, November 23, 1886	997	130
No. 52—Record of city council, December 6, 1886	1000	131
No. 53—Opinion in case of Des Moines Street Railroad Co. *vs.* City of Des Moines *et al.* (omitted in printing)	1002	—
No. 54—Record of city council, August 15, 1887	1012	132
No. 55—Record of city council, December 19, 1887	1015	132
No. 56—Record of city council, December 20, 1887	1022	137
No. 57—Ordinance authorizing the Des Moines Broad Guage Street Railway Co. to construct, maintain, and operate, by electric motive power or other than animal or steam power, on any street in the city of Des Moines, &c	1025	138
No. 58—Record of city council, January 2, 1888	1036	145
No. 59—Ordinance to regulate and control the laying and constructing of street-car tracks over, across, and upon the streets, alleys, and bridges of the town of North Des Moines, Iowa	1038	145
No. 60—Record of city council, May 24, 1888	1042	147
No. 61—Record of city council, May 29, 1888	1049	150

	Original.	Print.
Exhibit No. 62—Ordinance authorizing the maintenance and operation of a street railroad by the Des Moines Street Railroad Co., &c.	1055	154
No. 63—Ordinance imposing additional duties and granting certain privileges and exclusive rights to the Des Moines Broad Guage Street Railway Company	1063	158
No. 64—Record of city council, August 6, 1888	1070	161
No. 65—Deed from Des Moines Broad Guage Street Railway Co. to Des Moines Electric Railway Co., July 31, 1888	1072	162
No. 66—Deed from Des Moines Broad Guage Railway Co. to Des Moines Electric Railway Co., July 31, 1888	1074	162
No. 67—Petition in case of The City of Des Moines *vs.* The Des Moines Street Railroad Co., equity, 1677	1077	164
Exhibit A—Ordinance	1083	167
B—Resolution	1091	171
C—Ordinance	1096	174
No. 68—Motion to make petition more definite in case of The City of Des Moines *vs.* The Des Moines Street Railroad Co	1106	179
No. 69—Ordinance amending an ordinance entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines," &c.	1108	181
No. 70—Record of city council, August 8, 1888	1113	183
No. 71—Record of city council, October 9, 1888	1115	183
No. 72—Record of city council, October 9, 1888	1118	185
No. 73—Record of city council, November 8, 1888	1121	186
No. 74—Record of city council, November 13, 1888	1123	187
No. 75—Ordinance granting permission to the Des Moines Street Railroad Company to extend their track upon Ninth street from Clarkson street to Franklin avenue	1125	188
No. 76—Record of city council, January 10, 1889	1128	189
No. 77—Ordinance granting the Des Moines Electric Railway Company the right to extend its tracks and electrical equipments on Clark street, in the town of North Des Moines, Iowa	1130	189
No. 78—Ordinance granting to the Des Moines Electric Railway Company a right to construct and operate a line of its street railway on North street	1133	190
No. 79—Record of town council, April 26, 1889	1136	191
No. 80—Record of city council, May 1, 1889	1138	192
No. 81—Record of city council, May 6, 1889	1140	192
No. 82—Record of city council, May 27, 1889	1142	193
No. 83—Record of city council, May 27, 1889	1144	193
No. 84—Record of city council, May 28, 1889	1146	194

	Original.	Print.
Exhibit No. 85—Record of city council, September 5, 1889.....	1148	195
No. 86—Record of city council, September 5, 1889.....	1151	196
No. 87—Record of city council, September 5, 1889.....	1154	197
No. 88—Record of city council, September 10, 1889.....	1156	197
No. 89—Bill of sale from Des Moines Electric Railway Company to the Des Moines Street Railroad Company, October 1, 1889.....	1158	198
No. 90—Deed from the Des Moines Electric Railway Company to the Des Moines Street Railroad Company, October 1, 1889.....	1162	200
No. 91—Ordinance authorizing the construction and operation of street railroads in South Des Moines.....	1165	202
No. 92—Record of city council, January 7, 1884.....	1171	205
No. 93—Ordinance authorizing the construction and operation of street railways in Sevastopol, Polk county, Iowa.....	1173	205
No. 94—Ordinance No. 328.....	1180	209
No. 95—Bill of sale from Des Moines and Sevastopol Street Railway Company to Des Moines Street Railroad Company, October 1, 1889..	1182	210
No. 96—Record of city council, December 4, 1889.....	1185	211
No. 97—Ordinance authorizing the Des Moines Street Railroad Company to equip its Ninth Street line, and other lines it may hereafter receive authority to build, electrically and to operate the same by electricity.....	1188	212
No. 98—Record of city council, January 20, 1890.....	1191	213
No. 99—Record of city council, February 6, 1890.....	1193	214
Presiding justice's certificate..... ...(omitted in printing)..	1196	—
Clerk's certificate.....(" ")..	1197	—
Exhibit No. 100—Record of city council, February 28, 1890....	1200	215
No. 101—Record of city council, March 8, 1890.....	1202	216
No. 102—Ordinance amending ordinance No. 53.....	1204	216
No. 103—Record of city council, April 18, 1890.....	1207	218
No. 104—Act of the 23d General Assembly, April 24, 1890.....	1209	218
No. 105—Record of city council, June 7, 1890.....	1210	219
No. 106—Record of city council, April 20, 1891.....	1212	219
No. 107—Record of city council, July 27, 1891.....	1214	220
No. 108—Record of city council, August 3, 1891.....	1216	220
No. 109—Record of city council, April 15, 1892.....	1221	223
No. 110—Record of city council, May 1, 1893.....	1223	224
No. 111—Record of city council, July 17, 1893.....	1225	224
No. 112—Record of city council, July 24, 1893.....	1227	225
No. 113—Ordinance granting to the Des Moines Rapid Transit Company the right to construct railways, &c.....	1229	225
No. 114—Ordinance granting to the Des Moines Rapid Transit Company the right to extend its railway along Grand avenue, &c.....	1233	227

	Original.	Print.
Exhibit No. 115—Ordinance granting to the Des Moines Rapid Transit Company the right to construct, &c., in Greenwood park	1242	231
No. 116—Record of city council, March 21, 1892	1249	234
No. 117—Ordinance amending ordinance granting to the Des Moines Rapid Transit Company the right to extend its tracks along Grand avenue, &c.	1251	235
No. 118—Record of city council, March 18, 1889	1255	237
No. 119—Deed from Des Moines Rapid Transit Company to the Des Moines Suburban Railway Co., January 7, 1890	1257	237
No. 120—Record of city council, March 11, 1890	1259	238
No. 121—Resolution of the Des Moines city council extending the time to the Des Moines Rapid Transit Company to build or acquire its roads, &c.	1262	239
No. 122—Record of city council, March 13, 1890	1265	240
No. 123—Deed from C. C. Loomis, sheriff, &c., to P. B. Murrow, May 31, 1890	1267	241
No. 124—Deed from Des Moines Rapid Transit Co. to Des Moines Suburban Railway Company, October 29, 1890	1270	242
No. 125—Deed from D. B. Murrow to the Des Moines Suburban Railway Company, December 8, 1890	1272	243
No. 126—Ordinance granting to the Des Moines Belt Line Railway Company rights in certain streets in the city of Des Moines	1274	243
No. 127—Record of city council	1278	245
No. 128—Record of city council, June 7, 1888	1280	246
No. 129—Record of city council, July 7, 1888	1282	246
No. 130—Ordinance No. 441 amending ordinance No. 425, granting certain privileges to the Des Moines Belt Line Railway Company	1284	247
No. 131—Record of city council, February 20 and 28, 1889	1289	250
No. 132—Ordinance to grant certain rights, &c., in North Des Moines to the Des Moines Belt Line Railway Company	1291	250
No. 133—Ordinance granting certain rights, &c., in the town of North Des Moines, Iowa, to the Des Moines Belt Line Railway Company	1295	252
No. 134—Deed from the Des Moines Belt Line Railway Company to the Des Moines Suburban Railway Company, October 29, 1890	1304	257
No. 135—Ordinance granting to the Des Moines River Line Street Railway Co. the right to construct and operate a street railway in certain streets in the city of Des Moines	1311	261
No. 136—Record of city council, October 1, 1888	1320	266
No. 137—Record of city council, October 1, 1888	1322	267

	Original.	Print.
Exhibit No. 138—Deed from the Des Moines River Line Street Railway Company to the Des Moines Suburban Railway Company, October 29, 1890...	1325	268
No. 139—Deed from the Des Moines Suburban Railway Company to the Des Moines City Railway Company, July 28, 1893.....	1327	268
No. 140—Deed from the Des Moines Suburban Railway Company to the Des Moines City Railway Company, July 25, 1893.....	1330	270
No. 141—Deed from the Des Moines Street Railroad Company to the Des Moines City Railway Company, July 25, 1893.....	1334	272
No. 142—Deed from the Des Moines Street Railroad Company to the Des Moines City Railway Company, July 25, 1893.....	1336	273
No. 143—Ordinance granting to B. F. Elbert *et al.* the right to purchase, lease, or construct and maintain and operate street railways along, upon, and across the streets and alleys in the town of Grant Park, Polk county, Iowa.	1339	275
No. 144—Deed from B. F. Elbert *et al.* to Des Moines Suburban Railway Company, Jan. 15, 1889.	1344	277
No. 145—Ordinance authorizing the construction and operation of the Des Moines Broad Gauge Street Railway Company in Capital Park, Polk county, Iowa.....	1346	278
No. 146—Ordinance authorizing the construction and operation of the Des Moines Street Railroad Company in and along the streets of Capital Park, Polk county, Iowa.....	1354	282
No. 147—Ordinance extending and enlarging the rights and powers of the Des Moines Railroad Company in the town of Capital Park, Polk county, Iowa.....	1363	286
No. 148—Ordinance authorizing the Des Moines Electric Railway Company to construct, &c., street railroads in University Place.....	1367	288
No. 149—Record of city council.....	1372	290
No. 150—Record of city council, July 2, 1894.....	1376	291
No. 151—Record of city council, February 4, 1895.....	1378	292
No. 152—Record of city council, April 1, 1895.....	1385	296
No. 153—Record of city council, March 11, 1895.....	1388	297
No. 154—Record of city council, June 22, 1896.....	1390	297
No. 155—Record of city council, October 5, 1896.....	1392	297
No. 156—Record of city council, June 6, 1898.....	1394	298
No. 157—Record of city council, November 3, 1898.....	1396	298
No. 158—Ordinance No. 960, requiring street railway companies, &c., to provide fenders, March 28, 1899.....	1398	299
No. 159—Record of city council	1401	300
No. 160—Record of city council, April 17, 1899.....	1403	300
No. 161—Record of city council, April 17, 1899.....	1405	301
No. 162—Record of city council, June 5, 1899.....	1407	301

	Original.	Print.
Exhibit No. 163—Record of city council, July 3, 1899.....	1409	301
No. 164—Record of city council, August 7, 1899.....	1411	302
No. 165—Record of city council, September 25, 1899...	1413	302
No. 166—Record of city council, October 18, 1899.....	1415	303
No. 167—Record of city council, October 30, 1899.....	1417	303
No. 168—Record of city council, November 17, 1899...	1419	303
No. 169—Record of city council, December 18, 1899...	1421	304
No. 170—Record of city council, December 14, 1899...	1423	304
No. 171—Record of city council, December 14, 1899...	1425	305
No. 172—Record of city council, June 4, 1900.....	1428	306
No. 173—Record of city council, July 2, 1900.....	1430	307
No. 174—Record of city council, July 23, 1900.....	1432	307
No. 175—Record of city council, July 31, 1900.....	1434	307
No. 176—Resolution of board of supervisors, September 7, 1899.....	1436	308
No. 177—Record of city council, September 26, 1900...	1439	310
Record of city council.....	1441	310
No. 178—Record of city council, June 20, 1901.....	1443	311
No. 179—Record of city council, October 7, 1901.....	1445	311
No. 180—Record of city council, October 7, 1901	1447	312
No. 181—Record of city council, October 7, 1901.....	1449	312
No. 182—Record of city council, October 11, 1901.....	1451	313
No. 183—Record of city council, November 8, 1901....	1453	313
No. 184—Record of city council, November 11, 1901...	1455	314
No. 185—Record of city council, December 3, 1901....	1457	314
No. 186—Ordinance granting to George F. McKay, trustee, his successors and assigns, the right to construct, maintain, and operate a street railway in the city of Des Moines, &c.....	1459	315
No. 187—Record of city council, December 10, 1901...	1471	322
No. 188—Record of city council, January 23, 1902.....	1473	323
No. 189—Record of city council, March 14, 1902.....	1475	323
No. 190—Ordinance No. 1155, to straighten Seventeenth street between Grand avenue and Ingersoll avenue.....	1477	324
No. 191—Ordinance No. 1175, granting certain rights to the Des Moines City Railway Company....	1481	325
No. 192—Record of city council, April 20, 1903.....	1485	327
No. 193—Record of city council, April 27, 1903.....	1487	328
No. 194—Record of city council, May 4, 1903.....	1489	328
No. 195—Record of city council, May 28, 1903.....	1491	329
No. 196—Ordinance No. 1214, amending ordinance No. 107, passed November 14, 1899.....	1493	330
No. 197—Record of city council, June 8, 1903.....	1498	332
No. 198—Ordinance No. 1216, amending ordinance No. 711, passed February 4, 1895.....	1500	333
No. 199—Record of city council, June 15, 1903.....	1506	336
No. 200—Record of city council, June 15, 1903.....	1508	336
No. 201—Record of city council, August 3, 1903.....	1510	337
No. 202—Record of city council, August 17, 1903.....	1512	337
No. 203—Record of city council, September 8, 1903....	1514	338
No. 204—Ordinance No. 1232, to prevent accidents at the street-car waiting-room.....	1516	338

	Original.	Print.
Exhibit No. 205—Record of city council, September 21, 1903..	1519	339
No. 206—Record of city council, September 24, 1903..	1521	340
No. 207—Record of city council, September 28, 1903..	1523	340
No. 208—Record of city council, November 2, 1903....	1525	341
No. 209—Record of city council, November 17, 1903...	1527	342
No. 210—Record of city council, March 3, 1904.....	1530	343
No. 211—Record of city council, May 26, 1904.....	1532	344
No. 212—Record of city council, June 20, 1904..	1535	345
No. 213—Record of city council, July 5, 1904.....	1537	345
No. 214—Record of city council, August 29, 1904.....	1539	346
No. 215—Ordinance No. 1282, to amend No. 647.....	1541	346
No. 216—Record of city council, March 30, 1905.....	1544	347
No. 217—Record of city council, May 1, 1905.....	1546	348
No. 218—Record of city council, May 1, 1905.....	1548	348
No. 219—Record of city council, May 15, 1905.....	1550	349
No. 220—Record of city council, March 20, 1905.....	1553	350
No. 221—Record of city council, August 7, 1905.....	1555	350
No. 222—Record of city council, August 12, 1905.....	1557	351
No. 223—Record of city council, August 24, 1905.	1559	351
No. 224—Revised ordinances of 1900 (not set out).....	1562	352
No. 225—Deed of trust from the Des Moines Suburban Railway Company to the Iowa Loan & Trust Co. (omitted in printing).....	1563	—
No. 226—Notice from board of public works to the Des Moines City Railway Company, July 6, 1904.....	1583	352
No. 227—Record of city council.....	1585	353
No. 228—Ordinance No. 1129, establishing the grade of Clark street, &c.....	1592	356
No. 229—Judgment of dismissal in case of City of Des Moines *vs.* Des Moines Street R. R. Co., No. 1677, law.....	1594	357
No. 230—Judgment of dismissal in case of Des Moines Street Railway Company *vs.* Des Moines Broad Guage Street Railway Company, No. 1375, law.....	1596	358
Presiding justice's certificate. ....(omitted in printing)..	1598	—
Clerk's certificate..... " " ..	1599	—
Evidence for respondent.....	1600	358
Pages 9, 10, and 11 of "Revised Ordinances of 1900" (omitted in printing).....	1603	—
Ordinance No. 507 of "Revised Ordinances of 1900" (omitted in printing).....	1607	—
Opinion of supreme court of Iowa in West *vs.* City of Des Moines (omitted in printing)..... ...	1608	—
Opinion of supreme court of Iowa in McCain *vs.* City of Des Moines (omitted in printing).....	1627	—
Sections 31, 34, 35, 36, and 37 of ordinance No. 997 (omitted in printing)	1637	—
Testimony of William H. Bremner.....	1640	359
Exhibit A offered.....	1640	359
Exhibit B—Proceedings of city council.....	1640	359
C—Record of city council.....	1643	361

	Original.	Print.
Exhibit D—Record of city council	1645	362
225—Petition in case of City of Des Moines *vs.* Des Moines City Railway Co.	1658	369
226—Petition in case of City of Des Moines *vs.* Interurban Railway Company	1662	372
Respondent's exhibits (omitted in printing)	1664	—
Exhibit A—Abstract of record in case of Des Moines City Railway Company *et al. vs.* Iowa *ex rel.* Robert Fullerton *et al* ....(omitted in printing)..	1664	—
Petition .....(" ")..	1665	—
Application for leave to commence action (omitted in printing)	1670	—
Order granting leave to commence action, &c., (omitted in printing)	1672	—
Motion to set aside order...(omitted in printing)..	1677	—
Motion to make more specific (omitted in printing)	1679	—
Motion to strike.....(omitted in printing)..	1680	—
Amendment to petition....(" ")..	1680	—
Interrogatories .....(" ")..	1683	—
Amendment to petition....(" ")..	1683	—
Affidavit of J. S. Polk .....(" ")..	1686	—
Affidavit of Chas. Hutchinson (omitted in printing)	1697	—
Affidavit of W. C. Jarnagin (omitted in printing)..	1698	—
Amendment to motion to strike (omitted in printing)	1698	—
Order of 16th of December, 1905 (omitted in printing)	1700	—
Amendment and substituted petition (omitted in printing)	1701	—
Motion to fix time (omitted in printing)	1708	—
Order of 18th December, 1905 (omitted in printing)	1708	—
Motion to strike and dismiss (omitted in printing)..	1709	—
Order 8th January, 1906. ..(" ")..	1711	—
Notice of appeal.....(" ")..	1711	—
Motion to suspend proceedings (omitted in printing)	1711	—
Order of 13th January, 1906 (omitted in printing)..	1712	—
Index .....(" ")..	1714	—
B—Certified copy of "Ordinances and Council Proceedings of the City of Des Moines, published December 6, 1905" (omitted in printing)	1717	—
C—Petition of Robert Fullerton *et al.*, November 6, 1905 (omitted in printing)	1761	—
D—Report of city solicitor, November 17, 1905 (omitted in printing)	1763	—
225—Petition in case of City of Des Moines *vs.* Des Moines City Railway Co. (omitted in printing)..	1766	—
226—Petition in case of City of Des Moines *vs.* Interurban Railway Company (omitted in printing)..	1770	—
Examiner's certificate (omitted in printing)	1772	—

	Original.	Print.
Further evidence for respondent	1774	373
Testimony of J. W. Budd	1774	373
Robert Fullerton	1799	388
Examiner's certificate (omitted in printing)	1803	—
Respondent's Exhibits J and K—Blue print (" ")	1804	—
Exhibit 224—The Revised Ordinances of 1900 of the City of Des Moines, Iowa	1805	390
Stipulation for addition to record	2323	447
Evidence for complainant	2324	448
Index	2325	448
Offers of exhibits, &c	2327	448
Testimony of Jefferson S. Polk	2328	449
Offers of exhibits, &c	2349	461
Testimony of N. T. Guernsey	2361	467
Offers of exhibits, &c	2363	469
Opinion in case of Teachout *vs.* Des Moines Broad Gauge Street Ry. Co	2373	473
Offers of exhibits, &c	2386	480
Chapter 61, Revised Ordinances	2404	489
62, Revised Ordinances	2406	490
65, Revised Ordinances	2414	494
66, Revised Ordinances	2415	494
Offers of exhibits, &c	2417	496
Opinion in case of Des Moines City Railway Co. *vs.* City of Des Moines *et al.*	2438	506
Opinion in case of Des Moines Street Railway Co. *vs.* Des Moines Broad Gauge Street R. R. Co. *et al.*	2444	509
Offers of exhibits, &c	2448	511
Testimony of F. C. Tate	2475	525
G. B. Hippee	2487	533
Walter McCain	2578	583
J. S. Polk	2601	597
G. B. Hippee (recalled)	2620	608
Objections to ordinances	2660	632
Offers of ordinances	2662	632
Ordinance, chapter 28—Street railroads	2663	633
31—Street railroads	2670	638
47—Street railroads	2679	642
21—Street railroads	2688	647
53—Street railroads	2696	651
33—Street railroads	2705	655
59—Street railroads	2711	659
60—Street railroads	2715	661
Ordinance No. 1214	2725	666
No. 1216	2729	668
No. 1232	2734	671
No. 1282	2735	672
No. 1129	2737	673
Offers of exhibits, &c	2739	674
Testimony of N. T. Guernsey (recalled)	2740	674
Offer of exhibits, &c	2743	676
Examiner's certificate	2747	678

	Original.	Print.
Plaintiff's Exhibit A—Map	2748	678
B—Map	2749	678
C—Map	2750	678
D—Map	2751	678
E—Map	2752	678
F—Map	2753	678
Clerk's certificate to addition to record	2754	679
Statement of errors relied on and designation by counsel for appellant of parts of record to be printed, &c	2755	679
Designation by counsel for appellee of additional parts of record to be printed, &c	2770	688
Stipulation of counsel as to exhibits in transcript of record	2780	693

a VOLUME I. E. R. MASON, CLERK.

Pleadings and Proceedings in the Circuit Court of the United States for the Southern District of Iowa, Central Division, at a Term Thereof Begun and Holden in the City of Des Moines, in said District, on the 3rd Tuesday of November, A. D. 1906, the Same Being the 20th Day of November, A. D. 1906, Before the Honorable Smith McPherson, One of the Judges of said Court, in a Certain Cause Therein Pending, Wherein The Des Moines City Railway Company Was Complainant and The City of Des Moines Was Respondent.

b Be it remembered that heretofore to-wit: on the 27th day of November, A. D., 1906, there was filed in the office of the Clerk of said Court a Bill of Complaint wherein the Des Moines City Railway Company is complainant and the City of Des Moines is Respondent, which said Bill of Complaint is in words and figures as follows, to-wit:

1 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Bill in Equity.

To the Honorable Judges of the Circuit Court of the United States for the Southern District of Iowa:

The Des Moines City Railway Company, as complainant, brings this its bill of complaint against the respondent the City of Des Moines, and thereupon your orator complains and says:—

Par. 1. That your orator the Des Moines City Railway Company is a corporation created, organized and existing under and by virtue of the laws of the state of Iowa, with its principal place of business in the City of Des Moines in the said state; that your orator was organized as a corporation on or about the 24th day of July, 1893, for the purpose of carrying on a railway and street railway business, the general nature of the business to be transacted by it being stated in its articles of incorporation as follows:—

"The general nature of the business of this corporation shall be the acquisition by construction, lease or purchase of railways or street railways upon the streets and highways of the City of Des Moines and the adjoining towns and territories including any cities, towns or townships in Polk County and the adjoining counties in the State of Iowa, which power shall include the right to acquire rights of way, depot or other ground necessary for the

operation of its said railways and plant, by purchase, condemnation or otherwise and also to acquire all necessary rights, privileges and franchises therefor, and it shall have the power to own, maintain, sell or dispose of said system of railways or street railways rights, privileges, franchises or property or any part thereof, or to operate the same and carry freight, passengers and mail over and along the same and to transact and carry on any and all other business over and along the said railways and plant as is usually or may hereafter be transacted or carried on on other roads and plants of like character, including the right to operate said railways and plants
2 with electricity, steam or other power and to transmit said electricity, steam or other power over and along its wires and conduits and distribute the same to parties desiring to use the same for mechanical or other purposes. It is also hereby authorized to purchase or lease the property, real or personal, privileges, franchises and rights and capital stock in whole or in part, of any other railway or street railway company or other corporation owning and operating railways or street railways within the territory aforesaid."

Par. 2. That the respondent, the City of Des Moines is a City of the first class organized under the general laws of the state of Iowa, relative to municipal corporations, having all of the powers vested by such laws in such municipal corporations.

Par. 3. That on or about the 10th day of December 1866 the said City duly enacted an ordinance entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Iowa," which ordinance is hereunto attached and made a part hereof, marked exhibit "A."

Par. 4. That the grantee named in the said ordinance, the Des Moines Street Railway Company was a street railway corporation duly organized and existing under and by virtue of the laws of the state of Iowa, having due and legal authority to accept the grant made by said ordinance.

That the said Des Moines Street Railway Company did, within the time fixed by said ordinance and on or about December 13, 1866, file with the City Clerk a written acceptance of the same as provided in said ordinance, which acceptance was in the words and figures following, towit:

"Know all men by these Presents: That whereas the city council of the city of Des Moines did, on the 10th day of December, 1866, pass an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, wherein certain rights, privileges, and franchises were granted unto the Des Moines Street Railway Company, and also providing therein that said Des Moines Street Railway Company shall, within thirty days from the publication of said ordinance, file with the city clerk a written acceptance of the grants therein contained, signed by the president and secretary of said company: Now therefore, in pursuance of the directions of said ordinance, and for the purpose of carrying out its provisions, the Des Moines Street Railway Company does hereby accept the rights, privileges and fran-

chises granted to said company in said ordinance, with all the conditions, regulations and limitations therein contained, and does hereby agree to build and operate the said street railway in accordance with the terms of said charter and ordinance.

M. P. TURNER, *President.*
F. M. HUBBELL, *Secretary.*

Dated this 13th day of December, 1866.
(Fifty cent stamp affixed.)"

3 Par. 5. That on or about the 8th day of February, 1872, the said City of Des Moines duly enacted an amendment to the said ordinance of December 10th, 1866, which amendment was accepted by said Des Moines Street Railway Company, and was in the words and figures following, to-wit:

SEC. 9. This charter is granted, and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D., 1872, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and revert to the city of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of such given number of miles of said company. Provided that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order; and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall pay all expenses that may accrue by reason of such suit or suits, and unless such notices are served the time of the continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable."

Par. 6. That thereafter and on or about the 18th day of September, 1877, the said City further amended said ordinance of December 10th, 1866, by enacting an ordinance which was accepted by said Des Moines Street Railway Company, in the words and figures following, towit:

"An Ordinance to authorize the Des Moines Street Railway Company to use steam, horse, or animal power (such as is used on street railways and is acceptable in other cities) in the operation of their street railways.

SECTION 1. Be it ordained by the city council of the city of Des Moines, That section two (2) of ordinance 31, of the revised ordinances of 1874, is hereby repealed.

SEC. 2. In lieu thereof it is ordered as follows: The cars to be used on the tracks of the said Des Moines Street Railway Company shall be operated with steam power, such as is used on street railways and is acceptable in other cities, or animal power; and no car or carriage used on the tracks of any other company shall be used on the tracks of said street railway company.

This ordinance shall take effect by publication as required by law.

Passed September 19, 1877, and published September 29, 1877.

GILES H. TURNER, *Mayor.*

C. S. WILSON,
Clerk Pro Tem."

Par. 7. That under and by virtue of the grants of said ordinance of December 10, 1866, as so amended, and in all respects pursuant to and in accordance with the terms and provisions thereof, the said Des Moines Street Railway Company from time to time and from year to year, and until the assignment of its rights to the Des Moines Street Railroad Company, as hereinafter set out, and at all times in reliance upon the terms and conditions of the contract evidenced by said ordinance of December 10th, 1866, as amended, and the acceptance thereof, expended large sums of money in the construction, maintenance and operation of lines of street railway in the streets of said city, with the necessary equipment, appliances and fixtures therefor.

Par. 8. That thereafter and on or about the first day of July, 1886, the Des Moines Street Railroad Company, a street railway corporation created, organized and existing under and by virtue of the laws of the state of Iowa, purchased from the said Des Moines Street Railway Company, all of its street railway property, including all of its tracks, cars and equipment used in the operation of the same, and including all of the rights, privileges and franchises granted by said ordinance of December 10th, 1866, as amended.

Par. 9. That thereafter, controversies arose between the said Des Moines Street Railroad Company and the said city, and also between the said last named Company and other companies to which said city had attempted to grant certain street railway privileges, which controversies resulted in litigation between said Des Moines Street Railroad Company and said city and said other companies. That in the course of said litigation it was determined by the Supreme Court of Iowa that the said ordinance of December 10th, 1866, as amended, constituted and was a valid and enforcible contract between the said Des Moines Street Railroad Company and the said City of Des Moines. That the opinions of the

said Supreme Court in the matters above referred to are reported in Volume 73 page 513 and Volume 74 page 585 of the reports of said court and hereby by reference are made a part hereof as fully as if at length set out herein.

Par. 10. That on or about the 12th day of October, 1886, the said Des Moines Street Railroad Company instituted an action in the Circuit Court of the state of Iowa in and for Polk County to which suit the said City of Des Moines, and its then mayor and marshal were parties defendant, which suit constituted a part of the litigation above referred to.

That in the said suit the plaintiff set up, among other things, the contract above set out, and the necessity of extensions of its lines from time to time to furnish adequate street railway facilities to the inhabitants of said city, and to protect the investment of the plaintiff in its street railway lines already constructed; and prayed among other things, that the defendants might be restrained from interfering with any extensions of its line which the plaintiff might thereafter project.

That in the said suit such proceedings were had as that a decree was entered therein defining the exclusive period of the rights granted by said ordinance of December 10th 1866 as amended, and perpetually enjoining said city, its servants, officers and agents from interfering with extensions of its lines which said Company might desire to make in the future upon any streets in said City, as will more fully appear from a copy of said decree, which is in the words and figures following, to-wit:—

In the Supreme Court of the State of Iowa.

Decree No. 3503.

THE DES MOINES STREET RAILROAD COMPANY
vs.
THE CITY OF DES MOINES AND OTHERS.

"The above entitled cause coming on this day for final decree, upon the opinion of this court herein filed reverses the decree heretofore entered herein in the court below.

6 It is now upon consideration ordered, adjudged and decreed that the equities of this case are with the plaintiff and the decree of the court below is hereby set aside and reversed upon the plaintiff's appeal.

It is further ordered, adjudged and decreed, that the plaintiff under the ordinance of 1866 as subsequently ratified and adopted by the defendant, the city of Des Moines, Iowa, is entitled to the exclusive privilege of constructing and operating lines of street railway by animal power upon the streets of the city of Des Moines for the period of thirty years from the first day of January 1868, and that the plaintiff company has the right to extend its lines of street railway track and operate same by animal power upon any of the streets of the city of Des Moines. It is, therefore, ordered, adjudged

and decreed, that the defendants, the city of Des Moines, J. H. Phillips, Mayor of said city and A. H. Rankin, City Marshal, and their successors in office, be and are hereby restrained from interfering in any way with the construction, extension or operation by animal power of the plaintiff's lines of street railway upon any of the streets of the city of Des Moines.

Provided, that this decree shall not be held to operate as a restraint upon the exercise by the city of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extent of service that shall be furnished thereon.

It is further ordered and adjudged that the plaintiff have and recover of the defendant the costs of this suit taxed at $ — including the costs in the court below, and that execution issue therefor."

Par. 11. That on or about the 9th day of November, 1883, the said City of Des Moines passed an ordinance entitled "An Ordinance authorizing the construction and operation of street railroads in South Des Moines along and across the streets and alleys therein" whereby it was ordained, subject to the provisions and conditions of said ordinance:

"SECTION 1. Be it ordained by the City Council of the City of Des Moines: That consent, permission and authority is hereby given and granted to and vested in the Des Moines & Sevastopol Railway Company, and its successors and assigns, to construct, equip and maintain and operate for the term of thirty years, upon the conditions hereinafter stated, a single or double street railway track along such streets and alleys as said company may select in that part of the city of Des Moines lying south of the Raccoon river and east of the Des Moines River, and on Seventh street from the south side of Raccoon river over and along Seventh street bridge, and along Seventh street to Elm street in West Des Moines, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks and switches along the streets, and such alleys only fronting on which said company shall have depots, stables or car houses."

That said ordinance was duly accepted by said Company, which was a street railroad corporation organized and existing under the laws of the state of Iowa, and had prior to the 5th day of September 1889, constructed certain street railway lines in said city which said last named company was then operating.

7 12. That on or about the 20th day of December, 1887, the said City passed an ordinance entitled "An ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct, maintain and operate by electric or other motive power other than animal or steam power on any street, street railroads in the City of Des Moines and defining the powers and duties of said Company" whereby it was ordained, subject to the provisions and conditions set out in said ordinance:

"SECTION 1. Be it ordained by the City Council of the City of

Des Moines: That consent, permission and authority is hereby given and granted to and vested in the Des Moines Broad Gauge Street Railway Company, and its successors and assigns, to construct, maintain equip and operate for the term of twenty-five years, upon the conditions hereinafter stated, with electric or other practical motor power, other than animal or steam power, on any street, single or double track standard or broad gauge street railway tracks, four feet, eight and one-half inches wide, along and over the streets, alleys, viaducts, and bridges of and within the city of Des Moines, hereinafter designated; and such other streets and alleys as said company may hereafter select with the consent and approval of the said city; and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks and switches, and all necessary and convenient apparatus and appliances required for the proper use of such motive power to enable said company to comply with the requirements of this ordinance; and upon such alleys only fronting on which said company shall have depots, car barns or electric or other machinery. And in constructing, maintaining and operating said railway, said company shall have the right to intersect and cross the tracks of any street or other railway company."

That the said ordinance was duly accepted by said Company which was a corporation organized and existing under the laws of the state of Iowa, and under its provisions said Company and its grantee the Des Moines Electric Railway Company, a street railway corporation organized and existing under the laws of the state of Iowa, had prior to the 5th day of September 1889, constructed certain street railway lines in said city operated by electricity which said last named Company was then operating.

Par. 13. That numerous controversies had arisen between said Des Moines Street Railroad Company and Des Moines Broad Gauge Street Railway Company and the Des Moines Electric Railway Company, and between said Des Moines Street Railroad Company and the City relative to the rights of said companies under
8 the grants above set out and other grants made by said city, and were pending on or about September 5, 1889, to the great detriment of said companies and of the public, and thereupon to the end that said controversies might be ended, and the street railways of said companies might be consolidated, and rebuilt, and all equipped and operated under one management, by electricity which was then becoming a practical motive power, the said Des Moines Street Railroad Company entered into negotiations with said Des Moines Electric Railway Company and said Des Moines & Sevastopol Railway Company for the purchase of their property rights and franchises and entered into a contract to that end conditioned upon the passage of certain resolutions by said City.

That thereupon the said City enacted said resolutions which were duly accepted by said Des Moines Street Railroad Company, the said resolutions and acceptance being in the words and figures following, to-wit:—

"Whereas, Negotiations are now pending for the consolidation

of the different street railroad companies in the city of Des Moines, and it is believed that the general welfare of the city will be promoted by such consolidation, therefore, as an inducement to such consolidation be it Resolved, That in event of such consolidation taking place between the Des Moines Street Railroad Company, the Des Moines, Electric Street Railway Company, and the Des Moines-Sevastopol Street Railway Company so that said consolidated roads shall be operated under one management, the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter on condition that the Des Moines Street Railroad Company will dismiss its suit against the city of Des Moines and the Des Moines Broad Gauge Street Railway Company for damages growing out of the granting of certain franchises to the Des Moines Broad Gauge Street Railway Company and the Des Moines Electric Railway Company, and in such event the matters in controversy between said several parties in said suit shall be regarded as fully and finally settled.

Provided, That the company owning or operating such consolidated roads shall accept such modification of existing franchises as will require it within a reasonable time, not exceeding twelve months, to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart, nor shall any tracks now being operated be taken up unless by permission of the Council; and, provided, further, that not more than two tracks shall be laid upon any street, and whenever tracks are laid they shall be laid so as to leave as much room on either side as is practicable; and such company shall also accept such other reasonable rules and regulations relating to the construction and operation of the road as the safety and convenience of the people may require.

Approved:

W. L. CARPENTER, *Mayor.*

Adopted September 5, 1889."

9 "Whereas, Negotiations are now pending for a consolidation of the different Street Railway Companies of this city, and it is believed that the general welfare of the city will be promoted by such consolidation, therefore, as an inducement to such consolidation, be it

Resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines-Sevastopol Street Railway Company, so that said consolidated roads shall be operated under one management, that consent, permission, and authority is hereby granted to said consolidated company to operate its railways, now or hereafter constructed, by electricity or other practical motor power. This resolution shall not, however, be construed as authorizing the use of steam motors for propelling said company's cars.

Approved:

W. L. CARPENTER, *Mayor.*

Adopted September 5, 1889.

Acceptance.

To the Honorable Mayor and City Council of Des Moines, Iowa:

Whereas, on the fifth day of September, 1889, your honorable body passed certain resolutions concerning the consolidation of certain street railway lines, and granting certain rights and privileges to the consolidated company, and exacting certain duties in consideration thereof, and

Whereas, Said street railway lines are to be consolidated under the corporate name of the Des Moines Street Railroad Company, and immediately upon the passage and approval of said resolutions contracts were entered into between said companies to that end, and a part of the purchase price for said property was thereupon paid.

Now, therefore, the undersigned, the said consolidated railroad company, upon the condition that said consolidation be fully effectuated, as in said resolution stated, hereby accepts of the provisions and requirements of said resolutions and each of them and will proceed accordingly.

DES MOINES STREET RAILROAD CO.,
By W. M. McCAIN, *President.*
FRANK A. SHERMAN, *Secretary.*

Filed September 10, 1889."

Par. 14. That thereupon, in reliance upon the resolutions so enacted, and the various ordinances passed by said city, and the proceedings thereunder, the said Des Moines Street Railroad Company, purchased the property rights and franchises of said Des Moines Electric Railway Company and Des Moines and Sevastopol Railway Company, and paid therefor large sums of money, and immediately proceeded to rebuild its lines and to provide for the operation of all of them by electricity as a motive power, expending therefor large sums of money.

15. That on or about the 8th day of March, 1890, the said City of Des Moines further amended said ordinance of December 10, 1886, by enacting an ordinance in the words and figures following, to-wit:—

10 "An Ordinance amending Ordinance No. 63 (being Chapter 53, Revised Ordinances of 1889), entitled An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, passed December 10, 1886.

No. 492, Passed March 8, 1890.

Be it ordained by the City Council of the City of Des Moines:

SEC. 1311. Electricity. Section 1. That section 2 of said ordinance be and the same is amended so as to read as follows, to-wit:

SECTION 2. The cars to be used upon the railway tracks, constructed under and in pursuance of the ordinance or acquired by said company or its assigns, or that hereafter may be constructed or acquired, shall be operated by animal power or by electricity or other practical motor power. Provided that hereafter in laying its tracks on parallel streets the same shall not be laid nearer together than two blocks, unless the City Council shall consent thereto, nor shall any track of said company's road as now laid, be removed without the consent of the City Council; and provided further, that no more than two tracks shall be laid on any street, and when tracks are laid they shall be laid so as to leave as much room on either side thereof as practical, and further provided, that this amendment shall in no way be construed as authorizing the use of steam motors on said roads for propelling said company's cars, nor shall said company or its assigns, allow the use of its tracks for any other purpose than that of legitimate street railway traffic.

SEC. 1312. Rates. Section 2. That section 7 of said ordinance be and the same is hereby amended so as to read as follows:

SECTION 7. The rate of fare upon any one line or route of said company's railway, shall not exceed 5c.; provided, however, that children under five years, who are accompanied by their parents or nurse, shall be carried free.

SEC. 1313. Rules Changed. Section 3. That rule first of Section 13 of said ordinance shall be amended so as to read as follows:

First. No cars shall run at a greater rate of speed within the business portion of said City than eight miles an hour, nor shall the same be run in any other portion of said City at a greater rate of speed than twelve miles an hour.

Rule eleventh of said Section 13 shall be amended by adding thereto the following words: "And said company shall also accept such other reasonable rules and regulations for the constructions and operation of its roads as the safety and convenience of the people may require."

SEC. 1314. Acceptance. Section 4. This ordinance, when accepted by the Des Moines Street Railroad Company, shall be and become a part of the contract between it as the assignee of the Des Moines Street Railway Company and the City of Des Moines; provided, the same shall be accepted in thirty days from the passage thereof.

SECTION 1315. Publication. Section 5. This ordinance shall take effect from and after its publication as required by law; provided, that such publication shall be at the expense of said railroad company.

That the ordinance last above set out was duly accepted by said Des Moines Street Railroad Company and by section four thereof said City formally recognized the last named Company as the
11 assignee and successor of the Des Moines Street Railway Company.

That it is provided by chapter 11, Acts of the 23rd General As-

sembly of the state of Iowa, which became effective by publication April 30, 1890:

SEC. 1. "All cities and incorporated towns, including cities acting under Special charters, shall have the power to authorize or forbid the construction of street railways, within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal—electricity, steam, or other power, whether now known or hereafter utilized.

SEC. 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted, granting to any person or company the right to propel its cars by electricity are hereby declared legal and valid. Provided that nothing in this act shall effect (affect) present or pending litigation or any vested rights."

Par. 17. That in addition to the ordinances hereinbefore set out and referred to the City of Des Moines did on or about the — day of ——, 1874, re-enact the said ordinance of 1866 as then amended and confirmed the same as a part of the Revision of the ordinances of the said City of Des Moines adopted in the said year 1874.

Par. 18. That on or about the 6th day of October 1879 the said City again re-enacted and confirmed the said ordinance of 1866 as then amended as a part of the revision of the ordinances of the said City adopted at that time.

Par. 19. That on or about the 29th day of June 1866 the said City of Des Moines adopted an ordinance entitled "An Ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct and operate street railways in the city of Des Moines and defining the powers and duties of said company" whereby it granted to said Company, its successors and assigns the right to construct, maintain and operate for a term of twenty-five years upon the condition stated in the said ordinance, a single or double standard or broad gauge railway track on the streets of the City of Des Moines specified in the said ordinance, and upon such other streets of said city as said Company might thereafter select, with the consent and approval of the said city which ordinance was duly accepted by the grantee named therein. Street railways were constructed and operated thereunder by said grantee.

12 Par. 20. That on or about the 27th day of July 1888 the said City enacted an ordinance entitled "An ordinance imposing additional duties and granting certain privileges and exclusive rights to the Des Moines Broad Gauge Street Railway Company" which ordinance was duly accepted by the said Company.

Par. 21. That the said City of Des Moines now includes a number of organizations which were independent municipalities prior to the year 1890, among which were the Town of Greenwood Park, the Town of Capital Park, the Town of North Des Moines, the Town of Grant Park, and others, and that each of the said towns did prior to its incorporation into the City of Des Moines grant street railway franchises to the said Des Moines Street Railway Company, or to its assignees under which street railway lines were operated and maintained over the streets of the said towns. That all of the street railway franchises hereinbefore referred to were acquired and held by

the Des Moines Street Railroad Company prior to the organization of the complainant in the year 1893.

Par. 22. That on or about the 16th day of May 1888 the city of Des Moines granted to the Des Moines Belt Line Railway Company certain franchises in the city of Des Moines, granting to the said company the right to construct, maintain and operate its railways along and upon certain streets and across certain streets in the City of Des Moines, which franchise was duly accepted by said Company and the said Company, under the said franchises built and operated certain lines of street railway.

Par. 23. That on or about the 20th of September, 1888, the City of Des Moines passed an ordinance entitled "An ordinance granting to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets in the City of Des Moines" which ordinance granted to said Company the right to construct, maintain and operate a street railway in certain streets of the city of Des Moines. That under the said ordinance the said Company constructed and operated a line of railway.

13 Par. 24. That on or about the 14th day of May 1888 the City of Des Moines granted to the Des Moines Rapid Transit Company the right to construct maintain and operate street railways by an ordinance entitled "An Ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along and upon a certain street and across certain streets in the city of Des Moines" and that said ordinance was duly accepted and tracks were constructed and operated thereunder.

That the said City of Des Moines further on or about the 21st day of August 1888 granted another ordinance to the said Des Moines Rapid Transit Company purporting to grant to it certain rights to operate street railways in the city of Des Moines by an ordinance entitled "An ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railway along Grand avenue in the City of Des Moines, Iowa, from the point where its railway as now projected will intersect said Avenue, between West Seventeenth and Nineteenth streets, to the intersection of East Fifth street with Grand Avenue" which ordinance was duly accepted by the said Company.

Par. 25. That the rights granted to the said Des Moines Belt Line Street Railway Company, Des Moines River Line Street Railway Company and Des Moines Rapid Transit Company were all of them prior to the first day of July 1893 transferred and assigned to and vested in the Des Moines Suburban Railway Company, which was a street railway corporation organized and existing under and by virtue of the laws of the state of Iowa, with its principal place of business in the City of Des Moines, Iowa.

Par. 26. That on or about the 25th day of August A. D. 1893 the said Des Moines Street Railroad Company and the said Des Moines Suburban Railway Company transferred and assigned to your orator the Des Moines City Railway Company all of their street railways and properties in the city of Des Moines, including all of the street railway properties in the said towns hereinbefore referred to, all of

the rights, franchises, and privileges granted by the said City of Des Moines and by the municipalities incorporated therein under the various ordinances hereinbefore referred to, and that your
14 orator is, and ever since that time has been the owner of the said rights, privileges and franchises and is and ever since that time has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines.

Par. 27. That in ordinances and resolutions since enacted by the said City of Des Moines it has recognized your orator as the assignee and holder of all of the rights, privileges and franchises hereinbefore referred to and it assented without objection or protest to the exercise of the said rights, privileges and franchises by your orator from the date that your orator so acquired the said property until the passage of the resolution requiring your orator to tear up its tracks hereinafter referred to.

Par. 28. That in the case of your orator, the Des Moines City Railway Company *vs.* City of Des Moines 90 Iowa 770 the Supreme Court of the state of Iowa recognized your orator as the holder by assignment of the rights, privileges and franchises granted by the said original ordinance of December 10th, 1866, as amended.

Par. 29. That the said ordinance of December 10, 1866, as amended constitutes and is a contract between your orator and the city of Des Moines whereby there is vested in your orator the right, subject only to the restrictions and conditions specified in said ordinance, and unlimited as to time, to construct, maintain and operate an electric street railway system in the streets and alleys and over the bridges in the city of Des Moines, which right was exclusive for a term of thirty years from and after the first day of January 1868.

Par. 30. That the expenditures of your orator in acquiring said street railway system and the various other franchises, rights and privileges granted by said city of Des Moines and acquired by your orator as hereinbefore set out, and its expenditures thereafter made in rebuilding extending and maintaining said street railway system, and the equipment therefor, and the appurtenances thereto were all made by your orator in reliance upon the sanctity of the said contract evidenced by the said ordinance of December 10, 1866, as amended and the acceptances thereof.

Par. 31. That the said City of Des Moines has by a long series of acts and enactments during a long series of years uni-
15 formly treated the said ordinance as a contract as above set out and has by the enactment of many ordinances and resolutions since the year 1890 uniformly recognized the said ordinance of December 10th, 1866 as a contract, and interpreted it as hereinbefore set out.

Par. 32. That in reliance upon the said ordinance of December 10, 1866 as a contract as aforesaid and in reliance upon the rights, privileges and franchises conferred upon it by virtue of the other ordinances enacted by said city as hereinbefore set out, and in compliance with the terms and provisions thereof, and with the knowledge and consent of said city your orator and its assignors and grantors have expended many hundreds of thousands of dollars in

the construction, maintenance, equipment and operation of its said street railway system and power plant in said city, and has acquired and is now operating more than seventy miles of street railway therein.

That on or about the 1st day of January 1898, your orator owned, and operated in the said city about 40.8 miles of street railway, and that since that time its power plant has been rebuilt and enlarged and not less than three fourths of said track has been rebuilt by your orator and extensions thereof and additions thereto over thirty miles in length have been constructed by your orator, various of them at the request or by the direction of said city, and all of them with its knowledge and acquiescence; all of which was so done by your orator under and pursuant to and in reliance upon the authority so vested in it as aforesaid.

That in addition to the cost of constructing, maintaining and operating said street railway system said city has from time to time required and compelled your orator to make changes in its lines of street railway and extensions thereof, and lay and relay, and pay the cost of pavement upon streets upon which its lines were located, entailing upon complainant an expenditure of many thousands of dollars annually all of which complainant has paid in consideration of and solely in reliance upon said contract and upon the rights, privileges and franchises granted and secured to it by the several ordinances hereinbefore referred to.

16 Your orator further alleges that it now has and has with its grantors always claimed the right to build extend and operate its street railways upon such streets in the City of Des Moines as are necessary for the extension and development of its system of street railways so as to furnish adequate street railway service to said city; and at various times your orator and its grantors have extended such lines under and pursuant to the authority so duly vested in it.

That in order to successfully operate and maintain its said street railway system and to furnish adequate street railway facilities to the residents of said city, and in order to fulfill its obligations under said contract, your orator will be compelled from time to time to make changes in and extensions of and additions to its present lines of street railway.

That prior to the action of the City Council of said City hereinafter set out your orator had determined upon and was preparing to make divers extensions of and additions to its tracks and power plant and equipment which were and are necessary for the reasons hereinbefore set out.

That your orator is about to enter upon certain streets within said city for the purpose of laying its tracks thereon in accordance with the terms and provisions of the ordinances hereinbefore set out, and that the construction of said proposed extensions is necessary for the successful operation of your orator's street railway system and in order to furnish to the public in said city adequate street railway facilities.

That the respondent intends to and is about to interfere with your orator's right so to do under its said contract, and threatens to

and will unless restrained by the order of this court interfere therewith and with the right of your orator to maintain and operate its tracks already constructed in the streets of said city. And that to that end and for that purpose the city council of said city did on or about the 21st day of November, 1905, pass a resolution in the words and figures as follows, to-wit:—

17 Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Inter Urban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines; and

Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

Be it resolved by the City Council of the City of Des Moines: That said Companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all of the streets along which they now are operating their lines, and said Companies are hereby ordered to commence/ said removal within twenty-five (25) days after the passage of this resolution.

Be it further resolved: That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

Be it further resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

and thereafter, and on or about the 24th day of November 1905 did cause a copy of said resolution to be furnished your orator.

That respondent denies your orator's right under the contract and ordinances above set out to build additional lines or any extensions of or additions to its present lines, and denies your orator's right to maintain or operate the lines already constructed and now owned by it, and is about to and will interfere with and attempt to prevent your orator from building any such lines or extensions, and will interfere with and attempt to prevent your orator from maintaining and operating the lines already constructed and now owned and operated by it unless enjoined from so doing by this court.

Your orator further alleges that it is the intention of respondent to claim and enforce a forfeiture of all your orator's rights and privileges under said contract and ordinances hereinbefore referred to and your orator avers that so to do would result in immediate great and irreparable injury to your orator.

18 That in order to construct and equip the street railway system and power plant of your orator it has been necessary

for your orator and its grantors to borrow large sums of money, and that as evidences of such indebtedness there have been issued and are now outstanding the bonds of your orator in a very large sum which bonds are secured by a trust deed upon the property of your orator, including the rights, privileges and franchises granted by the respondent and held by your orator. That the said bonds are held as investments by numerous persons widely scattered through many states. That for the respondent to interfere with your orator's exercise of its rights under said contract and ordinances, by removing its tracks, or taking steps looking to their removal, or by interfering with their continued operation by your orator, or by interfering with or preventing your orator from making the necessary extensions of its lines which it is proposing to make, the said city will slander and discredit your orator's title to the said franchises and property, and impair your orator's credit, and embarrass its future operations as well as greatly and irreparably injure the holders of your orator's bonds who have invested therein on the faith of your orator's said contract with said City.

That under contracts with representatives of the post office department of the United States your orator is engaged in carrying the United States mail in pouches or sacks between the general post-office in said city and the various sub-stations of the post-office therein and is also collecting said mail in mail boxes located on substantially all the passenger cars operated by it, and carrying it to the employés of the post-office department in the business center of said city, and that for your orator's tracks to be torn up would render it impossible for your orator to perform this service.

That a very large proportion of the population of the said city depends solely upon the facilities furnished by your orator as its means of transportation between the various portions of said city, and to interfere with the maintenance and operation of your orator's street railway system would not only deprive your orator of
19 a large revenue on this account, the amount of which could not be accurately ascertained, but would cause serious and general inconvenience to the residents of said city.

Your orator alleges that it has a vested property right under and by virtue of said ordinance of date December 10, 1866, as amended, as well as under the other ordinances hereinbefore referred to, and that to forfeit such rights or to dispossess your orator of the same or to interfere with its exercise and enjoyment of them, will cause great direct, immediate and irreparable injury to said vested rights of your orator, and to your orator.

Your orator avers that the adoption of said resolution adopted by said city on or about November 21st, 1905, as above set out, and any enforcement of the terms and provisions thereof are in violation of the constitution of the United States and particularly of section 10 of Article 1 thereof and of Article XIV of the amendments thereto in that they impair the obligations of your orator's contracts with said city and if enforced against your orator will take its property and property rights without due process of law.

And your orator avers that it has no plain, speedy and adequate remedy at law and that unless it can have relief in a suit in equity it is remediless.

That this suit is a suit in equity of a civil nature, and that the matter in dispute in this action, exclusive of interest or costs, exceeds the sum or value of five thousand dollars. That this cause is a suit arising under the Constitution of the United States in this: That your orator seeks relief against the respondent by this bill by reason of an attempt on the part of the respondent to enforce against your orator, the resolution of the City Council of the City of Des Moines hereinbefore set out. That the said resolution and the action contemplated thereunder impairs and is in violation of the obligation of the contracts between your orator and the respondent and if enforced would take from your orator its property without due process of law, and deny to it the equal protection of the law in violation and in contravention of the provisions of the Constitution of the United States, and especially in violation of section One of Article XIV of the amendments to the Constitution of the United States, and of section Ten of Article One of the said Constitution.

To the end therefore that your orator may have the relief to which it is justly entitled in the premises it prays this Honorable Court to grant unto it due process by subpœna directed to the respondent the City of Des Moines, directing and commanding it to appear herein and answer (but not under oath, an answer under oath to this bill being expressly waived) the averments in this your orator's bill contained.

And for as much as your orator is remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity where matters of this character are properly cognizable and relievable, and to the end that the respondent be restrained from any violation of your orator's rights property rights or contracts your orator prays that the respondent the City of Des Moines, its City Council, officers, agents, servants and representatives and each and all of them be perpetually enjoined and restrained by the order and decree of this Court from proceeding further in the premises and from in any way interfering with your orator's rights under said contracts, ordinances and enactments, and that the said resolution of the city council of said city enacted November 21, 1905, requiring the removal of your orator's tracks, poles and wires and directing the City Solicitor to secure its enforcement be decreed to be void, and that the said City of Des Moines, its city council, officers, agents, servants and representatives, including its City Solicitor, be perpetually enjoined from proceeding thereunder to enforce the same, and from in any manner obstructing or interfering with your orator's free use and comfortable enjoyment of its property rights, franchises and privileges; and that your orator may have a temporary injunction pending the final determination of this suit, enjoining and restraining the said City of Des Moines as aforesaid, and that pending its application for such temporary injunction

your orator may have a restraining order restraining and
21 enjoining the said City of Des Moines as aforesaid; and that your orator may have such other further and full relief as may be agreeable to equity and good conscience, and for costs.

And your orator will ever pray etc.

DES MOINES CITY RAILWAY COMPANY,
By N. T. GUERNSEY,
GEORGE H. CARR,
W. L. READ,
Its Solicitors.

N. T. GUERNSEY,
GEORGE H. CARR,
W. L. READ,
Of Counsel.

UNITED STATES OF AMERICA, *Southern District of Iowa, ss:*

I, J. S. Polk, being duly sworn on oath state that I am the president of the above named Des Moines City Railway Company, that I Know the contents of the foregoing bill of complaint and have personal knowledge of the facts therein set out, and that the allegations of the said bill are true.

(Sgd.) J. S. POLK.

Subscribed and Sworn to before me by the said J. S. Polk on this 27th day of November, A. D., 1905.

[SEAL.] (Sgd.) CHAS. HUTCHINSON,
Notary Public in and for Polk County, Iowa.

22 EXHIBIT "A."

An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines.

SECTION 1. Be it ordained by the City Council of the City of Des Moines, that consent, permission and authority *is* hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turnouts, side-tracks, and switches in, upon, and along all the streets, and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.

SEC. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

SEC. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities: *Provided*, said company shall at all times have the right to use their tracks for transporting iron, ties, and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said company.

SEC. 4. The tracks of such railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may establish such grades; where the streets are not graded, said company may, if they desire, lay
23 their tracks so as to conform to the surface of such streets; *Provided*, that they raise the same to the grade when the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the tracks; *Provided*, said company shall plank the space between the tracks at each principal street crossing whenever required by the Street Committee.

SEC. 5. The said City of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water-pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas-pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

SEC. 6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated in which case the tracks may be laid as such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley, as provided for in Section One, a single track only shall be laid, and no side-tracks, switches, or turnouts, except in cases where turnouts are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed upon any such alley: *Provided*, however, that if said Company shall have its depot-, stations, stables, or car-houses on any lot fronting on such alleys, they shall have the

privilege of laying down turnout tracks leading from such alleys into such depots, stations, stables or car-houses.

SEC. 7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five (5) years after the completion of the first
24 mile of track, *mile of track*, and thereafter shall not exceed the rate of six cents for any one route.

SEC. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle, or other obstacle, in, upon, across, along or near the track- of said railway, or either of them, after being notified by the driver or conductor, by the ringing of the car-bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the mayor of said city, be fined in any sum not less than five nor more than fifty dollars.

SEC. 9. This charter is granted and the rights and privileges herein conferred, are subject to the following conditions and qualifications, to-wit.

That said company shall have at least one mile of said railway fully completed and equipped, and cars running upon the same by the first day of January, A. D. 1869.

That they shall have one additional mile so completed and equipped, and cars running thereon by the first day of January, A. D. 1871.

And one additional mile, fully completed and equipped, and cars running thereon by the first day of January, A. D. 1873, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited and revert to the city of Des Moines: *Provided*, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time for such delay shall be given to said company over and above the time given by this section
25 for the completion of such given number of miles of said railway: *Provided*, that in case any such injunction or order of court, or any judge is procured upon the application of any party other than the said city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order, and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company; said company shall pay the City Solicitor a reasonable fee for services rendered, and unless such notice is given, the time of the continuance of such order or injunction shall not be so given to said company.

SEC. 10. The right herein granted to said company to operate

said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

SEC. 11. After the year A. D., 1875, whenever there may be any fair-grounds, or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some central part of the city, and it may be deemed for the public interest to have a street railway built to or near such fair-grounds or other place of public resort, the City Council may, by a two-thirds vote require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such route within one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the same time and run the same upon the same terms as the company to which this grant is made.

26 SEC. 12. Said company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be subscribed and sworn to by the Secretary and Treasurer of the company, and there shall be levied on such net receipts a tax of three per cent. for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the city are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be such net receipts and the city tax shall be levied thereupon as above provided. And the tax hereinbefore provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof, in the same shall not be taxed in any other manner for any municipal purposes.

SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners from one street to another the horses or mules attached thereto shall not be driven faster than a walk.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near at stations.

(4) No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

27–35 (5) No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collission, or to prevent danger to persons in the street, or to take on or leave off passengers.

(6) The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one on or near the track, the cars shall be stopped when, by so doing, such injury may be averted.

(7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

(8) The conductors shall use proper diligence to prevent ladies or children under twelve years of age, from leaving or entering the cars while in motion.

(9) Conductors shall announce to passengers in a distinct tone, the names of all streets crossed as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

(10) The cars after sunset shall be provided with signal lights.

(11) No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses, and at each end of the lines, and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

SEC. 14. Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations, above expressed, signed by the President and Secretary of said Company, and when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever.

SEC. 15. This ordinance shall take effect from and after its publication in the Daily Iowa State Register.

Passed Dec. 10, 1866.

Published Dec. 14, 1866.

(Endorsed:) Filed November 27, 1905, by E. R. Mason, Clerk.

* * * * * * *

36 And afterwards, to-wit, Jan. 1, 1906, there was filed in said Clerk's office in said Cause, Answer of the above named Defendant to the Bill of Complaint of the above named Plaintiff, which is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division. In Equity.

DES MOINES CITY RAILWAY COMPANY, Plaintiff,
vs.
CITY OF DES MOINES, Defendant.

Answer of the Above Named Defendant to the Bill of Complaint of the Above Named Plaintiff.

In answer to the said bill, the above named defendant, City of Des Moines, says as follows:

Paragraph 1. It admits that the Des Moines City Railway Company, the above named plaintiff, is a corporation created, organized and existing under and by virtue of the laws of the State of Iowa, with its principal place of business in the City of Des Moines in said state, and that it was organized as a corporation on or about the 24th day of July, 1893, for the purpose of carrying on a railway and street railway business; and further admits that the general nature of the business to be transacted by it is as stated in Paragraph 1 of the bill of complaint of the plaintiff herein.

Par. 2. That it admits that it, the City of Des Moines, is a city of the first class, organized under the general laws of the State of Iowa, relative to municipal corporations, and having all the powers vested by such laws in such municipal corporations.

Par. 3. It admits that on or about the 10th day of December, 1866, that it, the said City, duly enacted an ordinance entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Iowa," and that Exhibit "A" attached to the bill of complaint is a correct copy of said ordinance.

37 Par. 4. It admits the truth of the allegations set forth in Paragraph 4 of the bill of complaint.

Par. 5. It admits the allegations contains- in Paragraphs 5 and 6 of the bill of complaint.

Par. 6. That as to the truth of the allegations contained in Paragraph 7 of the bill of complaint, this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same.

Par. 7. That it admits that the Des Moines Street Railroad Company, a street railway corporation created, organized and existing under and by virtue of the laws of the State of Iowa, purchased from the said Des Moines *Des Moines* Street Railway Company, all of its street railway property, including all of its tracks and equipments used in the operation of the same. That as to the exact date of such purchase, this defendant has neither knowledge nor information sufficient to form a belief, but is of the opinion that the date stated in Paragraph 8 of the bill of complaint, to-wit: the first day of July, 1886, is approximately correct. That it denies that the said Des Moines Street Railroad Company purchased the rights, privi-

leges and franchises granted by said ordinance of December 10, 1866, as amended, but admits that it attempted to so do.

Par. 8. It admits that controversies arose between the said Des Moines Street Railroad Company and this defendant, and also between the Des Moines Street Railway Company and other companies to which the City of Des Moines had granted certain street railway privileges, which controversies resulted in litigation between said Des Moines Street Railroad Company and said City and said other companies, but denies that in the course of said litigation, it was determined by the Supreme Court of Iowa that the said ordinance of December 10, 1866, as amended, constituted and was a valid and enforcible contract between the said Des Moines Street Railroad Company and the said City of Des Moines, but avers that in the case referred to in Paragraph 9 of the bill of complaint, no question was raised as to whether said ordinance constituted
38 a valid and enforcible contract in the hands of the Des Moines Street Railroad Company.

Par. 9. It admits the allegations contained in Paragraphs 10, 11, 12, 13, and 14 of the bill of complaint.

Par. 10. It admits that on or about the 8th day of March, 1890, the City of Des Moines further amended said ordinance of December 10, 1866, substantially as set forth in Paragraph 15 of the Bill of Complaint, and admits that said ordinance was accepted by the Des Moines Street Railroad Company and further admits that the provisions of Chapter 11 of the Acts of the Twenty-third General Assembly of the State of Iowa was substantially as claimed in Paragraph 15 of the bill of complaint.

Par. 11. That it denies that the said ordinance of 1866 was re-enacted in 1874, but avers that the revision adopted in said year was simply a collection of the ordinances then believed to be in force.

Par. 12. That it denies that on or about the 6th day of October, 1879, the said City re-enacted the said Ordinance of 1866.

Par. 13. That it admits the allegations contained in Paragraph 19, 20, 21, 22, 23, and 24 of the bill of complaint.

Par. 14. That as to the truth of the allegations contained in Paragraph 25 of the bill of complaint, this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same.

Par. 15. It admits that on or about the 25th day of August, 1893, an attempt was made by the Des Moines Street Railroad Company and other companies operating street railways in the City of Des Moines to transfer and assign to the Des Moines City Railway Company, the plaintiff herein, all of their street railways and properties in the City of Des Moines, and in the towns adjacent thereto, together with all of the rights, privileges and franchises granted by the said City of Des Moines and by the municipalities incorporated therein under the various ordinances referred to in the bill of complaint, but this defendant believes that the Des Moines Street Railroad Company and other companies had no power or right to transfer to the plaintiff herein the rights, privileges and franchises owned

and enjoyed by the Des Moines Street Railroad Company and
39 other companies. It admits that ever since the 25th day of August, 1893, plaintiff herein has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines.

Par. 16. It denies that the City of Des Moines has recognized the plaintiff as the assignee and holder of all the rights, privileges and franchises hereinbefore referred to and that it has assented without objection or protest to the exercise of the said rights, privileges and franchises.

Par. 17. As to the allegations contained in Paragraph 28 of the bill of complaint, it states that in the case of the Des Moines City Railway Company *v.* City of Des Moines, 90 Iowa, 770, no question was raised as to the ownership of the rights, privileges and franchises granted by the ordinance of 1866 as amended.

Par. 18. That it denies that the ordinance of December 10, 1866, as amended, constitutes and is a contract between the plaintiff herein and the City of Des Moines, unlimited as to time, and that by said ordinance there is vested in the plaintiff the right to construct, maintain and operate an electric street railway system in the streets and alleys and over the bridges in the City of Des Moines, but states that said ordinance granted the right to construct, maintain and operate a street railway system in the streets and alleys and over the bridges in the City of Des Moines for a limited length of time, to-wit: Thirty years. That all the rights, privileges and franchises obtained under said ordinance expired by limitation and by the terms of said ordinance on or about the first day of January, 1898.

Par. 19. Answering Paragraph 30 of the bill of complaint, it states that as to the matters upon which the plaintiff herein was relying at the time it acquired the street railway system hereinbefore referred to, it has neither knowledge nor information sufficient to form a belief, and states that whatever they may have been, they are immaterial and can not prolong the life of the rights and privileges granted by said ordinance of December 10, 1866.

Par. 20. It denies each and all of the allegations contained in paragraph 31 of the bill of complaint.

40 Par. 21. That it admits that many thousands of dollars have been expended in the construction, maintenance, equipment and operation of the street railway system and power plant in the City of Des Moines, and that the plaintiff is now operating more than seventy miles of street railway in said City. That as to the number of miles of railway the plaintiff was operating in said City on or about the first day of January 1898, this defendant has neither knowledge nor information sufficient to form a belief, but has no reason to doubt the statement contained in the bill of complaint that the plaintiff was operating 40.8 miles at said time; denies that since that time the plaintiff has ever been requested or directed by the City of Des Moines to make any additions to or extensions of its system. Admits that what extensions have been made, have been made with the knowledge of the said City, but without its acquiescense therein.

Par. 22. That it denies that the City of Des Moines has from time to time required or compelled the plaintiff to make changes in its street railway or to make extensions thereof, or to lay or relay any of its tracks, but admits that it has been required to pay portions of the cost of pavement upon streets upon which its lines were located.

Par. 23. That it admits that the plaintiff and its grantors have always claimed the right to build, extend and operate its street railways upon the streets of the City of Des Moines, but denies that such claim has ever been admitted by the City of Des Moines.

Par. 24. That it admits that in order to successfully operate and maintain its street railway system and to furnish adequate street railway facilities to the residents of the City of Des Moines, it will be necessary for the plaintiff from time to time to extend its present plans, but denies that such extensions will be made or can be made pursuant to any contract now existing between the plaintiff herein and the City of Des Moines, and denies that any contract now exists between the plaintiff and said City under and by virtue of which the said plaintiff is authorized to maintain and operate its present railway system or to make extensions thereof.

Par. 25. That as to whether the plaintiff is about to enter
41 upon certain streets within the City of Des Moines for the purpose of laying its tracks thereon, this defendant has neither knowledge nor information sufficient to form a belief.

Par. 26. That it denies that the City of Des Moines intends to or is about to interfere with any rights of the plaintiff herein or that it threatens to interfere with any rights which the plaintiff now has. That it admits that on or about the 21st day of November, 1905, the City Council of the City of Des Moines passed the following resolution:

"Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines, and

Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

"Be it resolved by the City Council of the City of Des Moines: That said Companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets along which they now are operating their lines, and said Companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

"Be it further resolved: That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be it further resolved: That the City Clerk be and he is hereby

instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

Thereafter and on or about the 24th day of November, 1905, it caused a copy of said resolution to be furnished to the plaintiff.

42 Par. 27. That this defendant denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff herein unless it shall be declared by some Court of competent jurisdiction that the plaintiff has no right to maintain or operate said system. That it was the intention of the City of Des Moines in the passage of the resolution heretofore referred to to simply lay a foundation for the commencement of an action for the purpose of testing the rights of the plaintiff to so maintain and operate its said railway system, and further states that it is the intention of said City to commence an action in equity in the District Court of the State of Iowa, in and for Polk County, it being a Court of competent jurisdiction, for the purpose of testing such rights, and that the City of Des Moines has no intention to do otherwise than this, and does not now threaten or never has threatened to interfere with the plaintiff by force, or to attempt to take away or forfeit any rights, privileges or franchises which the plaintiff herein claims to have, except under and by due process of law.

Par. 28. That it is not now and never has been the intention of the City of Des Moines to take from or attempt to take from the plaintiff herein any rights which it may have under and by virtue of the ordinances referred to in the bill of complaint, but that the City of Des Moines is simply seeking to have the rights of the plaintiff fully determined by a Court of competent jurisdiction to the end that the plaintiff herein may not exercise rights and privileges of which it is not the possessor. That the City of Des Moines is simply seeking to protect and preserve its own rights and the rights of the public by resorting to a Court of competent jurisdiction.

Par. 29. That it admits that the plaintiff herein is engaged in the carrying of United States mail as set forth in the bill of complaint, but denies that such fact can extend, increase or change the rights and privileges of the plaintiff herein to maintain and operate a street railway system, in, upon and along the streets of the City of Des

43 Moines; denies that it is the intention of the City of Des Moines to interfere directly or indirectly with the carrying of such mail; denies that it is the intention of the City of Des Moines to tear up the tracks of the plaintiff.

Par. 30. That it denies that the plaintiff has a vested property right either by virtue of the said ordinance of December 10, 1866, as amended, or the other ordinances referred to in the bill of complaint.

Par. 31. That it denies that the adoption of the resolution above referred to passed on or about the 21st day of November, 1905, and the enforcement of the terms and provisions thereof are in violation of the Constitution of the United States or of Section 10 of Article 1

thereof, or of Article 14 of the amendments thereto, or that the said resolution or the enforcement thereof will impair the obligation of any contracts which the plaintiffs may have with the City of Des Moines, or will cause the taking of the plaintiff's property or property rights without due process of law, but on the contrary, it is the purpose and intent of such resolution that unless the plaintiff shall voluntarily and of its own accord cease the maintenance and operation of its railway system, that then the City of Des Moines will proceed by due process of law to ascertain what rights the plaintiff herein has under and by virtue of the ordinances hereinbefore referred to, and that the City of Des Moines has not now and never has had any intentions to do otherwise.

Par. 32. This defendant further states, that this is a controversy between two citizens of the State of Iowa; that no Federal question is involved, and that this Court is without jurisdiction to hear the same.

Wherefore, because of the facts hereinbefore set forth and because this defendant has no intention to do the things complained of in the bill of complaint, and because this defendant is proceeding in all respects in accordance with its rights, and is not interfering or attempting to and never has it threatened to take from the plaintiff any property or property rights without due process of law, this defendant prays that the temporary restraining order heretofore issued in this cause be dissolved, and that the bill of the complain-
44 ant be dismissed, and that it be allowed to go hence with its costs.

CITY OF DES MOINES,
By W. H. BREMNER,
M. H. COHEN,
W. M. McLAUGHLIN,
Its Solicitors.

STATE OF IOWA,
County of Polk, Southern District of Iowa:

I, W. H. Bremner, being duly sworn on oath, say, that I am the City Solicitor of the City of Des Moines; that as such I have prepared the foregoing answer; that I know the contents thereof and that I have knowledge of the facts therein set forth, and that the statements and allegations therein made are true as I verily believe.

(Sgd.) W. H. BREMNER.

Subscribed in my presence and sworn to before — by the said W. H. Bremner, this 22nd day of December, 1905.

[SEAL.] (Sgd.) W. E. KOOKER,
Notary Public in and for Polk Co., Iowa.

(Endorsed:) Filed Jan. 1, 1906, by E. R. Mason, Clerk.

45–51 And on the same day, to-wit, Jan. 1, 1906, there was filed in said Clerk's office in said cause, a Replication of Complainant, which is in words and figures as follows, to-wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division. In Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

The Replication of the Des Moines City Railway Company, Complainant, to the Answer of the City of Des Moines, Respondent.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

DES MOINES CITY RAILWAY COMPANY,
By N. T. GUERNSEY,
W. L. READ,
GEO. H. CARR, *Its Solicitors.*

(Endorsed:) Filed Jan. 1, 1906, by E. R. Mason, Clerk.

* * * * * * *

52-65 And thereafter, to-wit, Aug. 14, 1906, there was filed in said Clerk's office in said Cause, a Praecipe for Appearance, which is in words and figures as follows, to-wit:—

In United States Circuit Court, Southern District of Iowa, Central Division.

No. 2437. Equity. —— Rule Day.

DES MOINES CITY RAILWAY COMPANY, Plaintiff,
versus
CITY OF DES MOINES, Defendant.

Praecipe for Appearance.

The Clerk of said Court will please enter the appearance of the undersigned as Solicitors for Defendant in above cause.

(Sgd.) W. H. BREMNER,
HOWARD J. CLARK,
WM. H. BAILY,
Solicitors for Defendant.

(Endorsed:) Filed Aug. 14, 1906. E. R. Mason, Clerk.

* * * * * * *

66 And afterwards, to-wit, Nov. 16, 1906, there was filed in said Clerk's office in said Cause, a Notice of Application for Leave to Amend Answer, which is in words and figures as follows, to-wit:—

In United States Circuit Court, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Plaintiff,
versus
CITY OF DES MOINES, Defendant.

Notice of Application for Leave to Amend Answer.

To the Des Moines City Railway Company, or to George H. Carr, W. L. Read, and N. T. Guernsey, its Solicitors:—

You are hereby notified that defendant will file in the office of the clerk of said Court, its motion for leave to amend its answer, a copy of which motion and amendment to the answer are hereto attached, and that said motion will be set down to be heard on the first day of the November 1906, Term of said Court, to be held in Des Moines, commencing the 20th day of November, 1906, or as soon thereafter as the same can be heard. You may appear and take such action at said time and place as you may be advised.

(Sgd.) W. H. BAILY,
HOWARD J. CLARK,
W. H. BREMNER,
Solicitors for Defendant.

Service of the foregoing notice accepted and receipt of a copy thereof with copy of motion and amendment to the answer attached acknowledged this 16th day of November, A. D., 1906.

(Sgd.) N. T. GUERNSEY,
W. L. READ,
GEO. H. CARR,
Solicitors for Des Moines City Railway Company, Complainant.

(Endorsed:) Filed Nov. 16, 1906. E. R. Mason, Clerk.

67 & 68 And on the same day, to-wit, Nov. 16, 1906, there was filed in said Clerk's office in said Cause, a Motion for Leave to Amend Answer, which is in words and figures as follows, to-wit:

In the United States Circuit Court, Southern District of Iowa.

DES MOINES CITY RAILWAY COMPANY, Complainant,
versus
CITY OF DES MOINES, Defendant.

Motion for Leave to Amend Answer.

Comes now defendant, City of Des Moines, and moves the court that leave be granted to file herein the annexed amendment to answer; and shows to the court the matters in said amendment set forth are necessary to a just determination of this action and were omitted through oversight in the original answer. That said amendment raises no issue upon which evidence will be necessary in addition to that already taken.

(Sgd.) W. H. BREMNER,
W. H. BAILY,
HOWARD J. CLERK,
Solicitors for Defendant.

STATE OF IOWA, *Polk County, ss:*

I, W. H. Bremner, city solicitor of defendant City of Des Moines, being duly sworn, on oath depose and say that the matters set forth in the proposed amendment to answer are material and necessary to a just determination of this cause. That they were not known to or understood by the solicitors for defendant when the original answer was filed, and were not fully known or understood until the evidence was taken. That no evidence in addition to that already taken will be necessary upon the matters referred to in said amendment.

[SEAL.] (Sgd.) W. H. BREMNER.

Subscribed and sworn to before me this 16th day of November, 1906.

(Sgd.) W. M. McLAUGHLIN,
Notary Public in and for Polk County.

(Endorsed:) Filed Nov. 16, 1906. E. R. Mason, Clerk.

* * * * * *

69 And thereafter, to-wit, Nov. 21, 1906, there was filed in said Clerk's office in said Cause, a Resistance to Application for Leave to Amend Answer, which is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY CO., Complainant,
vs.
CITY OF DES MOINES, Defendant.

Resistance to Application for Leave to Amend Answer.

The complainant resists the application of the defendant for leave to amend its answer, and as grounds for such resistance states:

First. That the matters set up are irrelevant and immaterial and do not constitute a defense.

Second. That the application is made too late, and that the defendant has not been diligent in the matter.

In support of this ground of the objection, the complainant calls attention to page 284, volume 1, of the evidence filed, which shows that on August 10, 1906, G. B. Hippee was called for further cross-examination, and was cross-examined on behalf of defendant by W. H. Baily, one of its counsel. The complainant also calls attention to cross interrogatories 48 *et seq.* propounded to the said Hippee by Mr. W. H. Baily, commencing at page 293 of the said volume of the record.

The complainant calls attention to the fact that the portions of the record just referred to show that as early as August 30th, 1906, counsel for the defendant had actual knowledge of the provisions of the ordinances in question, which are referred to in paragraphs 33 and 34 of the proposed amendment to their answer, and had called to their attention the facts as to the actions of the parties under these provisions of said ordinances.

70 The complainant states that it is too late at this time to set this matter up by an amendment to the answer, since the testimony has been taken and the case has been subject to call for final hearing since shortly after said cross-examination.

The complainant states as to the matter sought to be set up as paragraph 35 of the bill, that the defendant has at all times had in its possession copies of the ordinances in question, and that the manner in which the cars of the complainant are run is a matter of public knowledge, and that there is no excuse for the failure of the defendant to promptly set this matter up, if it relied upon it, or for its failure to plead it before the testimony had been closed.

(Sgd.) N. T. GUERNSEY,
WM. L. READ,
GEO. H. CARR,
Solicitors for Complainant.

(Endorsed:) Filed Nov. 21, 1906. E. R. Mason, Clerk.

71 And afterwards, to-wit, Dec. 3, 1906, there was filed in said Clerk's office in said Cause an Amendment to Answer, which is in words and figures as follows, to-wit:

In the United States Circuit Court, Southern District of Iowa.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Defendant.

Amendment to Answer.

Comes now defendant first and asks leave to amend its answer filed in the above entitled cause, and leave being granted, defendant amends its said answer by adding thereto the following:

Paragraph 33. That in and by the ordinances mentioned in paragraph 3 of the bill, it is agreed that the grantee company, its successors and assigns shall annually file with the city treasurer a sworn statement or report of the net earnings of said street railway for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made.

That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchises and right to maintain and operate its said system of street railways, and are an important part of the conditions upon which said grants were made. That the said agreements are obligatory upon complaint as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporations named in said ordinances, or of the successors or assigns of said corporations, has at any time during the ten years last past made or filed any statement or report of net earnings as in said ordinances provided.

That until complainant shall on its part comply with and perform the said terms and conditions of said ordinances, and make
72 and file said statements or reports, it is not entitled to and ought not to receive the aid of this court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded.

Paragraph 34. That in and by the ordinances mentioned in paragraphs 12 and 19 of the bill, it is agreed that the grantee company, its successors and assigns shall annually from and after the year 1897, pay to the city treasurer for the use of the city, five per cent. of net earnings of said railways for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made to pay to the city or to the city treasurer for its use, a part of the net earnings from said railways. That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchise and right to maintain and operate its said system of street

railways and are an important part of the conditions upon which said grants were made.

That the said agreements are obligatory upon complainant as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporations named in said ordinances or of the successors or assigns of said corporations, has at any time paid or offered to pay to the city or to the city treasurer, any part of said net earnings or any sums agreed to be paid.

That until complainant shall on its part comply with and perform the terms and conditions of said ordinances and pay to the city or to the city treasurer for its use, the said portion of net earnings so agreed to be paid, it is not entitled to receive the aid of the court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded.

Second. Defendant asks leave to further amend its answer filed in the above entitled cause, and leave being granted, defendant amends its said answer by adding thereto the following:

73 Paragraph 35. That in said ordinances mentioned in paragraphs 12 and 19 of the bill of complaint, it is provided, stipulated and agreed that:

"Cars shall start from both ends of any line as early as six o'clock A. M. and run continuously as late as twelve o'clock, midnight; from six to nine A. M., and from nine o'clock P. M. until midnight, cars shall run at intervals of not more than ten minutes, and from nine o'clock A. M. until nine o'clock P. M. cars shall run at intervals of not more than five minutes."

"A failure to use any track or tracks and run cars thereon as provided * * * for a period of thirty days * * * shall be deemed an abandonment of such street or part of street * * * and the city council may by resolution, declare such street or part of street abandoned and require said company to remove its tracks from any such street or part of street, and upon failure or refusal of said company to so remove its tracks when notified so to do, the city council may cause the same to be removed at the expense of the company."

That if, as alleged in the bill of complaint, there is or was when the resolution complained of was adopted, or at any time, a contract between complainant and defendant, the foregoing provision, stipulation and agreement in the ordinances mentioned in paragraphs 12 and 19 of the bill of complaint, is and was a part of said contract. That more than thirty days, to-wit, for more than thirty days, prior to the date when the resolution complained of was passed, the complainant had failed to use its tracks and run cars on the various lines of its road as provided in said ordinances and in the foregoing provision, stipulation and agreement therein.

That by virtue of the power in said ordinances reserved as well as under the power conferred in the law referred to in paragraph 16 of the bill of complaint, and Section 767 of the Code of 1897 of Iowa, defendant had and has the right, power and authority to pass and enforce the resolution complained of and to remove or cause

to be removed complainant's street railways and street railway tracks from the streets of defendant City.

Wherefore defendant prays as in its original answer, and that the bill be dismissed at complainant's costs.

(Sgd.) W. H. BREMNER,
W. H. BAILY,
HOWARD J. CLARK,
Solicitors for Defendant.

74 & 75 STATE OF IOWA, *Polk County, ss:*

I, W. H. Bremner, being duly sworn, on oath depose and say that I am the City Solicitor of the City of Des Moines, defendant, that I have made the foregoing amendment to answer and that the statements therein made are true as I verily believe.

(Sgd.) W. H. BREMNER.

Subscribed and sworn to before me this 16th day of November, 1906.

[SEAL.] (Sgd.) W. M. McLAUGHLIN,
Notary Public in and for Polk County.

(Endorsed:) Filed Dec. 3, 1906, By leave of Court. E. R. Mason, Clerk.

* * * * * * *

76 And afterward, to-wit, Feb. 20, 1907, there was filed in said Clerk's office in said Cause an Order filing a written opinion herein directing a decree for the complainant, which is in words and figures as follows, to-wit:

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY
vs.
CITY OF DES MOINES.

Order.

Now on this day, the presiding and trial judge files a written opinion herein directing a decree for the complainant.

It is hereby ordered that complainant's counsel prepare a decree in tentative form, within five days of this date, and serve a manifold copy thereof on one of defendant's counsel; that defendant's counsel, within five days thereafter, file written objections thereto, after which the said form as drafted by complainant's counsel, and the objections thereto of defendant's counsel, be submitted to the court to the end that a decree herein may be entered.

Done at Des Moines, Iowa.
February 20, 1907.

(Sgd.) SMITH McPHERSON, *Judge.*

(Endorsed:) Filed Feb. 20, 1907. E. R. Mason, Clerk.
Ent. Book "U" page 55.

77 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY
vs.
THE CITY OF DES MOINES.

Mr. N. T. Guernsey, Mr. W. L. Read, and Mr. George H. Carr, For Complainant.
Mr. W. H. Bremner, Mr. Howard J. Clark, and Mr. W. H. Bailey, For Defendant.

Opinion.

SMITH MCPHERSON, *Judge:*

This is a case by a bill in equity without a diversity of citizenship. The jurisdiction of the court is challenged, the defendant city insisting that there is no federal question: while the plaintiff contends that its property is sought to be taken without due process of law, and that its contract with the city, as to the duration of its franchise, is sought to be impaired, and will be impaired if the city is not restrained.

Jurisdiction is most generally acquired, when acquired at all, in cases between citizens or corporations of different states. But in this case, as both parties are Iowa corporations, jurisdiction cannot thus be acquired.

If this court takes jurisdiction, it is by reason of Article 3, Section 2 of the United States Constitution, and the Statutes of
78 Congress enacted thereunder. The Constitution in part recites with reference to the United States Courts:

"The judicial power shall extend to all cases, in law and equity, "arising under the constitution, the laws of the United States, and "treaties made or which shall be made under their authority."

The enactments of Congress conferring jurisdiction, are pursuant to the Constitutional provision.

If both the state and federal courts would have jurisdiction, the plaintiff has the election of bringing it in either, and such election is not a subject of criticism. It is a right. And the fact that the other party prefers to have the litigation in a court of another jurisdiction, is not a reflection on any court, nor a subject of criticism.

No judge will seek to acquire jurisdiction. And no judge with the slightest courage will seek to avoid the responsibilities, to the end that he may lighten his work.

The only possible practical question as to the disputes between these parties, as to what court shall enter a decree, is as to what court on appeal the case may be carried.

If the city is right in its contention that the State District Court only can take jurisdiction, then on appeal the Iowa Supreme Court will decide all questions of fact, and all questions of law, except

questions pertaining to the United States Constitution, which alone will finally be decided by the United States Supreme Court.

But if the street railway company is correct in its contention, that this court has jurisdiction, then the case can be taken direct to the United States Supreme Court, and that Court will determine all questions of fact, and all questions of law, including all constitutional questions. But with matters of appeal this court has nothing to do, and they are only referred to because of the arguments.

79 But it is not a question of labor nor responsibility, nor shirking of either; but is a question of jurisdiction, and that depends upon the question of whether there is a "federal question" in the case.

In 1866 Des Moines was a city of about six thousand people. It had no street cars, and quite likely no other city of the state had. Up to that time, there was no statute on the subject. The only statute that could be referred to as at all germane to the subject, was section 1064 of the Revision of 1860 which in the most general terms gave city councils power over the streets. Under that statute, no doubt, the city council assumed authority to pass an enactment in the form of an ordinance of date December 10, 1866, referred to as the Dr. Turner Ordinance, and is as follows:

"SECTION 1. That consent, permission and authority is hereby given and granted to and fully vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single "or double track for passenger railway lines, with all necessary and "convenient tracks for turnouts, side tracks and switches in, upon, "and along all the streets, and such alleys only fronting on which "said company have depots, stables or car-houses, and over the "bridges and such streets in the City of Des Moines, with their "present and future extensions and connections, and authority is "hereby given said company, their successors and assigns, to keep, "maintain, use, and operate thereon railway cars in the manner and "for the time, and upon the conditions hereinafter mentioned and "prescribed."

Section 2 provides that the cars shall be operated by animal power.

Section 3 provides that the same shall be used for carrying passengers and baggage.

Sections 4, 5, 6, 7, and 8 are not material to this inquiry.

Section 10 which, with section one, more than all other matters are the subject of this litigation, is as follows:

"SEC. 10. The right herein granted to said company to operate "said railway, shall be exclusive for the term of thirty (30) years "From the time the first mile of said track is laid and cars running "thereon, and the said City of Des Moines shall not, until after the "expiration of said term grant to or confer upon any person or cor-"poration any privileges which will impair or destroy the rights "and privileges herein granted to said company."

Section 11 is with reference to building to fair grounds.

80 Section 12 requires annual statements, and is with reference to taxes.

Section 13 need not be stated, while Section 14 is with reference to acceptance of the terms of the ordinance.

The ordinance was timely accepted, and by January first, 1868, sufficient tracks had been constructed and in operation as to be the beginning of the thirty years referred to in Section 10. Complainant shows that by assigns, transfers, etc., it is the successors of the company named in the ordinance.

The thirty year period referred to in the ordinance, expired January 1, 1898, and whether the rights and franchises of the company expired nine years ago, or the exclusive and monopoly period only, is the real question of the case; the city contending that all rights then ended, and the street car company, that the exclusive period only, with its rights as perpetual in common with such other companies as may desire with the consent of the city to go into business.

The Des Moines Street Railway Company named in the Dr. Turner Ordinance, operated the lines until 1886, when it sold and conveyed the property, franchise included, to the Des Moines Street Rail Road Company.

About that time another company was organized, referred to as Broad Gauge Company, with a purpose to construct and operate lines by horse power. Litigation ensued between the two companies to which the city was a party. The Litigation resulted:

1. The exclusive provision of section 10 of the Ordinance of December 10, 1866, was upheld and the Broad Gauge Company was enjoined from operating.

2. It was held that whether the city under the Revision of 1860 had authority to pass the Ordinance of 1866, was not important, as the Legislature had since recognized and ratified it.

Des Moines Street Railroad Cases, 73 Iowa 513.
Des Moines Street Railroad Cases, 74 Iowa 585.

81 Thereupon the city granted authority to the Broad Gauge Company to operate by electric power. And the courts held that operating by electric power was not a violation of the exclusive right to operate for thirty years by horse power.

Teachout *vs.* Des Moines Street Car Co., 75 Iowa, 722.

The two companies disputed with each other and the city until 1889, when a settlement was effected by a consolidation resulting in the Des Moines Street Rail-road purchasing the electric company. Suits were settled and dismissed, the city council adopted a resolution imposing certain conditions, and the company accepting them.

It will be recalled that section 2 of the Turner Ordinance of December 10, 1866, required the moving of cars by animal power.

But March 8, 1890, the city council amended it, by providing that the power used could be electric, or other practical motor power.

And the terms of that ordinance were accepted by the Street Car Company.

Less than two months thereafter the Legislature by chapter 11 Acts of 23 G. A., approved April 24, 1890, with a publication clause, legalized said ordinances as follows:

"SEC. 2. All ordinances or resolutions of such cities or incor-
"porated towns heretofore enacted, granting to any person or com-
"pany the right to propel its cars by electricity are hereby declared
"legal and valid."

So that from the foregoing it will be seen that we have a case as though the ordinances of December 10, 1866, was passed under full statutory authority, with section two reading that the power shall be electric "or other practical motor power" and as though the Des Moines Street Rail Roaf Company was named in the ordinance.

Still later on, complainant herein by purchase became the owner, including the franchises, of other lines, constructed in adjacent municipalities, now a part of the city of Des Moines.

82 In 1898 when the thirty year exclusive period of the Turner Ordinance expired, complainant had about 40 miles of road, and when the resolution now to be mentioned was passed, it had about 70 miles of road, all in operation.

November 21, 1905, the city council adopted a *resolution*. The wording thereof was the result of several efforts in phrasing. But by passing it, it became the work of the council, and the resolution is as follows:

One "whereas" is that questions have been raised as to the rights of the complainant to maintain its tracks and operate its lines on the streets. And the other "whereas" is that to preserve the rights of the city, that such questions be speedily determined.

Then:

"Be it resolved by the City Council of the City of Des Moines:
"That said companies be and they are hereby ordered to remove all
"of their tracks, poles and wires from the streets, bridges and public
"places of the City of Des Moines, and to restore and repair the sur-
"face and pavement, where paved, of all of the streets along which
"they now are operating their lines, and said companies are hereby
"ordered to commence said removal within twenty-five (25) days
"after the passage of this resolution.

"Be it further resolved, That should the said Railway Companies
"fail to commence such removal within the time above specified,
"the City Solicitor be and he is hereby instructed to take such ac-
"tion as he shall deem advisable and necessary to secure the en-
"forcement of the above resolution.

"Further resolved, That the city clerk serve a copy hereof upon
"the Des Moines City Railway."

Service was made November 24, 1905, whereupon this action was brought. The complainant protested against this resolution.

Complainant has 70 miles of street railway now in operation, costing large sums of money, built under the ordinance of 1866. It claims to own this vast property and to be operating the same. Whether it has such right or not, it makes such claim, and claims a contract therefor, but a claim denied by the city.

Section 8, Article 1 of the United States Constitution provides:

83 "No state shall pass a law impairing the obligation of contracts."

That means that there must be a contract. Whether there is a contract, is the controversy herein.

There must be an obligation. But that depends in this case as to whether there is a contract.

Whether the resolution of November 21, 1905, is a law, is a legal question, affirmed by the company, and denied by the city.

And while the constitution says, "No state shall pass a law impairing a contract," all courts and all lawyers agree that the word "state" means that a city or other subdivision or agency of a state cannot be allowed to impair a contract. And it is also agreed that if the company has the right to own and operate its lines under a contract by ordinance and acceptance thereof, that the city will be impairing such contract, if over the protest of the company, an ordinance is passed terminating such contract.

The evils of the days of the Confederation, during and following the War of the Revolution were in mind when our Constitution was formulated and adopted? The makers of our Constitution believed as all fair-minded men now believe, that states and cities should observe and have the same regard for contracts, as do individuals of integrity. In those days it was common for states to not only repudiate their contracts, but destroy by legislation the contracts between individuals. And in a few instances since the adoption of the Constitution, states have by legislation attempted this: notably the state of Georgia after granting some lands, learned of the unpopularity thereof, and on charges against some of the members of corruption, with some proof tending to sustain the charges, undertook on its own motion by its legislature to cancel its contract. The case was carried to the Supreme Court, and what Chief Justice Marshall wrote in the case of Fletcher *vs.* Peck, 6 Cranch, has been as a guide from that year (1810) to this.

84 Of late years the states have but seldom attempted this. But that it is one of the evils of municipal government of the day, is a fact known by all who read, or are observing.

It is no attack upon the personnel of city governments to say this. It is the system that has brought it about. It too often happens that good men, but scarcely capable of managing small affairs, are given official position in municipal affairs. The result is that no well defined course or policy is mapped out, and nearly everything done by one administration is sought to be overthrown by the next regardless of costs, and the loss in expenditure of thousands of dollars of the people's money.

As long as this is mere *legislation* under present systems there is no help for it, because in mere legislation, one council cannot bind a succeeding council. One can enact, but the next can repeal.

But when the enactment of a council is a valid contract, then the next council cannot repeal. And courts will and must see to it that the contracts are observed, and all talk about the wrongs of the contract, or favor with which the repeal is received, should not move a court.

So that if sections 1 and 10 of the ordinance of 1866, as amended, and as legalized by the legislature were a contract with complainant's assignors, then such contract cannot be destroyed, nor even impaired by a later enactment of the city council, because as all the courts hold, and all lawyers agree, that the word "state" included the word "city" in the Constitution, where it recites, "No state shall pass any law impairing the obligation of contracts."

And that an enactment of a city council is a law, of course is conceded by all, and needs no elaboration.

The complainant contends that it has a perpetual contract.

85 The city denies this, and by an enactment declared the complainant a trespasser on the streets. And that thereby we have a case arising under the Constitution, is the holding of this court, and of which I am not in doubt.

What is held is, that if the federal question is presented in good faith; is not merely colorable; that even if there is a well founded difference of opinion as to the merits of the question, but the question is fairly stated in the pleadings; then an United States Court takes jurisdiction, not only over that question, but as to the whole case on all questions. The correct rule cannot better or more clearly be stated than by Justice Brown in the Indianapolis Street railway case in 166 U. S. 557.

"It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be."

And again:

"All that is necessary to establish the jurisdiction of the court is "to show that the complainant had, or claimed in good faith to "have, a contract with the city, which the latter had attempted to "impair."

That this court has jurisdiction of this case regardless of the citizenship of the parties, one need but read the case cited, and the following: Walla Walla *vs.* Water Company, 172 U. S. 1; Vicksburg Water Company *vs.* Vicksburg, 185 U. S. 65; R. R. *vs.* Mississippi, 102 U. S. 135; Shoshone *vs.* Rutter, 177 U. S. 505. These cases, and the cases therein cited, make it wholly unnecessary to multiply citations.

But counsel for the city contend that the resolution of 1905 declaring complainant's rights at an end were not a law, because in the form of resolutions, and that *ordinances* only are laws of a city. Congress at every session passes laws in the form of joint resolutions. Many legislatures often do the same. And with cities it at all times is difficult to determine in which form it should act. That a council can authorize the occupancy of its streets by resolutions, as well as by ordinance, has been held by the Iowa Supreme Court.

86 The Merchants Company *vs.* Railway, 70 Iowa 105.
Street Railway *vs.* City of Des Moines, 73 Iowa 513 *522*.

And that a resolution is a law, when the effort is made to terminate what is in fact a contract, has been held in the following cases:

Saginaw *vs.* City of Saginaw, by Judge Brown in Fed. Rep. 529.
Vicksburg *vs.* Vicksburg, 185 U. S. 65.
Electric Co. *vs.* Los Angeles 194 U. S. 112.
Riverside Co. *vs.* Riverside 118 Fed. Rep. 736.
R. R. *vs.* Memphis, 96 Fed. Rep. 113, by the Circuit Court of Appeals, Sixth Circuit, Opinion by Judge Taft.
Vicksburg Co. *vs.* Vicksburg, 202 U. S. 453.

It would be a strange, as well as curious proposition, that if there is a contract under the ordinance of 1866, that it cannot be impaired by law in the form of an ordinance, but that it can be ridden down by a resolution, by insisting that a resolution is not a law.

All agree that when the statute requires an ordinance, that a resolution will not do, and that only is what many of the cases cited hold. There is no doubt about that.

And when an ordinance is required, and the ordinance is enacted, that such ordinance cannot be amended or repealed by a resolution. There is no doubt about that.

Cascaden *vs.* Waterloo, 106 Iowa 673.
R. R. *vs.* Chicago, 174 Illinois 439.
People *vs.* Mount, 186 Illinois 560.

But the answer to all this is, that the ordinance of December 10, 1866, and the amendment thereto, need only have been a resolution, and is treated as a resolution. And that though in the form of an ordinance and even invalid as such, it will be upheld as a resolution. A resolution was all that was necessary, as held by the Iowa Supreme Court in the cases already cited.

87 Finally it is urged by counsel for the city that the case can be decided under the Iowa Constitution, and therefore there is no federal question. That is the rule as to taking a writ of error to the Supreme Court, but it is not the test as to jurisdiction of this court. The contention of the city is because of Article 1, Section 21 of the Iowa Constitution: "No law impairing the obligation of a contract shall ever be passed," and those other provisions, much like recitals to be found in the Fourteenth Amendment.

Thirty-two of the states have a similar provision, and yet time and again from those states have cases arisen and been carried through the Supreme Court without a diversity of citizenship, on federal questions from states, wherein were involved the contract clause, and of taking property without due process of law. It must never be forgotten, that the Constitution of the United States according to its own recitals in Article 7, is as follows:

"This Constitution, and the Laws of the United States which shall "be made in pursuance thereof * * * shall be the supreme law "of the land."

And when it is not so, this government will be at an end, and we will again have a Confederation. In most cases wherein the United States Circuit Courts take jurisdiction, such courts and the state

courts have concurrent jurisdiction. But if the contention of defendant's counsel is correct, then in thirty-two states of this Union, United States Courts are ousted of jurisdiction by the action of those states, while in the remaining states the jurisdiction remains. The entire error is in assuming that the resolution of November 21, 1905, is *ultra vires*, instead of saying that it is a repudiation, and an attempted impairment of a contract.

It is a rule of construction, that the one will be adopted which the parties themselves have adopted.

Von Hosyrup *vs.* Madison City, 1 Wallace 291.
Chicago *vs.* Sheldon, 9 Wallace 50, 54.

88 For years the City of Des Moines, as well as the street car company, has construed the Turner Ordinance as one granting perpetual franchise, unless forfeited for just cause.

Resolution after resolution has been passed by the council, expressly or impliedly recognizing the Turner Ordinance. The council has compelled the company to pave on account of tracks built since 1898, the date the city now says its franchise expired. It now says that the Turner Ordinance expired by limitation in 1898 and that since that time the ordinance has been obsolete. And yet in 1900 in codifying the ordinances in force, and omitting obsolete ones, the Turner Ordinance was placed in such Code as a live ordinance, and one of present binding force.

The city council has directed new lines to be built since 1898; and since that date thirty miles have been built at great cost, and by so doing not only construed the ordinance as the company now contends, and the city ought to be and is estopped from denying the contract, tearing up the tracks or declaring the company a trespasser. The complainant owns the tracks built by the Turner company and its successors, and by conveyances of record owns the franchises as well, which were assignable.

R. R. *vs.* Delamore, 114 U. S. 501.
Detroit *vs.* Street Railway, 184 U. S. 368, 395.
People *vs.* O'Brien, 111 New York 1.

It is not to be overlooked that section 1064 of the Revision of 1860 under which the Turner Ordinance was enacted, was much enlarged by 464 of the Code of 1873. What was very doubtful under the Revision, was made clear under the Code of 1873, because the city council was then given express authority to authorize both street and steam railways to occupy the streets; the latter, however, to pay damages to abutting property. But the authority of the city as to both was the same. And no one will claim that in case of a 89 steam road — after paying damages, is limited as to time in its occupancy. The duration as to time as to both is the same, unless limited by the terms of the ordinance. This is important in connection with the words, "for the time" in Section 1 of the Turner Ordinance.

The fact that the life of complainant as a corporation is limited to a term of years, is not decisive, because it has the right under our general corporation laws, to renewal. And if it had not, its assets,

including the franchise asset, belong to the stockholders subject to the rights of its mortgage and general creditors. In 1866 there was no specific statutory authority for granting permission to occupy the streets with street car lines. Des Moines then had but about six thousand people, and it was about as large as any other city of the state. But Dr. Turner and others had confidence in its growth. And the then city council desired to aid in building up the city, by enabling people to reside beyond the business district. So that the ordinance was enacted under a statute giving general control only over the streets. The system was thus inaugurated, and carried on for fourteen years, with an expenditure of two hundred thousand dollars, and no profits. Then when profits were in sight, the council granted rights to other companies and the litigation commenced.

But the Iowa Legislature by the Code of 1873 gave specific authority to the city councils over the streets as to street railways, then and ever so necessary to the people. And since the adoption of the Code of 1873 there have been many recognitions by the city council of what was done in 1866.

Section two of that ordinance provides for animal power, later changed to electric power by ordinance, with the consent of the company, and legalized by the legislature. But the grant is in section one.

And that section provides, which is again noticed, even though a repetition, as follows:

90 "That consent, permission and authority is hereby given "to and duly vested in the Des Moines Street Railway Com- "pany, and their successors and assigns to lay a single or double track "for passenger railway lines, upon, and along all the streets * * * "and over the bridges and such streets in the City of Des Moines, "with their present and future extensions, and authority is hereby "given said company their successors and assigns, to keep, maintain, "Use and operate thereon cars, in the manner and *for the time*, and "upon the conditions hereinafter mentioned and prescribed."

"And for the time" calls for construction.

Many cases of the highest authority are called to my attention, to emphasize the undoubted and most familiar rule, that a public grant must be given the construction most favorable to the public, when it is susceptible of two or more constructions. But neither statutes nor ordinances are to be frittered away by construction. Like contracts, they are to be held up by the four corners, examined, and given a fair construction. Let it be kept in mind, that for what appeared sufficient reasons, the legislature has from time to time, limited the time of several municipal utility corporations and their rights to the streets. But not so with street railway lines.

And let it be kept in mind, that to prevent the ordinance from being void by creating a perpetual monopoly, that the monopoly feature was limited to thirty years of time, now expired.

So that it seems to me and clearly so, the words "and for the time" in section one, refer to the monopoly feature of section ten. And section ten creates the monopoly, and has reference only to the monopoly. It grants a monopoly absolutely, but limits it to thirty

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years. But for the monopoly feature, it was not inserted, and in my opinion it is wholly without reason as to any other feature of the situation. There is no grant of power, right, nor authority of any kind in section ten, except the grant of a monopoly, and that limited to a definite time.

Such was the construction placed upon it by eminent and impartial lawyers wholly without interest, in early days of the life of this plant, on which money was advanced for the extension of the lines for the use of people desiring homes distant from the business district, and was the construction placed thereon by the law department of the city in litigation.

101–102

The construction thus given was in effect that section ten was not a grant, except for the monopoly for thirty years. And this being so, the words "and for the time" in section one are easily understood as referring to the right to use the streets to the exclusion of all other companies for thirty years, and thereafter in competition with other companies.

Questions of rates, or transfers, or taxation are not involved. Nor are questions as to the efficiency of service, that which interests the people more than all else in connection with a street railway system. And with efficient service, and reasonable rates the people are content. And with these in mind, the legislature was content, not to allow the monopoly for all time, but to allow one company in common with all others, to have a continuing franchise. And when it fails to furnish such service, the remedy is plain.

But in the mean time there is a contract that must be observed by the city.

This case is an interesting one, and has been elaborately argued. This opinion, lengthy as it is, would be a volume in size if I were to notice all the authorities cited. While this is not possible, I have noticed all the points of importance.

I am of the opinion that this is a case cognizable in equity, and within the jurisdiction of this court. I am of the opinion that the Turner Ordinance of December 10, 1866, is still in force, with the exclusive or monopoly feature of section ten expired by limitation of time, and that the complainant has the right to operate its lines under that ordinance; and that a court of equity should and will enjoin the enforcement of the resolution of November 21, 1905.

And there will be a decree for complainant.

Des Moines, Iowa, February 20, 1907.

(Endorsed:) Filed Feb. 20, 1907, by E. R. Mason, Clerk.

* * * * * * *

103 And afterwards, to-wit, Mar. 30, 1907, there was filed in said Clerk's office in said Cause, a Final Decree, which is in words and figures as follows, to-wit:

IN CENTER

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

No. 2437. Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
THE CITY OF DES MOINES, Defendant.

Final Decree.

This cause came on to be heard at this term on final submission of the case, and was fully argued by counsel, and the case was fully submitted on the pleadings and evidence, and was by the court taken under advisement. And on the 20th day of February, 1907, the presiding and trial judge filed a written opinion herein.

And now at this time, the cause coming on for final decree on the pleadings and evidence, and the court being fully advised, finds the equities of the case to be with the complainant.

And the court does now order, adjudge and decree that the complainant, the Des Moines City Railway Company, has succeeded by purchase to all the rights granted under the ordinance of date December 10, 1866, the said ordinance being one of the said City of Des Moines, entitled, "An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," which said ordinance is set out as exhibit "A" in complainant's bill of complaint in this cause, and the said ordinance as subsequently amended and modified, and as ratified and confirmed by said city, constitutes and is a valid and existing contract between the complainant, the Des Moines City Rail-
104 way Company, its successors and assigns, and the defendant, the City of Des Moines, and that the rights vested in the complainant, the Des Moines City Railway Company, its successors and assigns by said contract are perpetual, except only as set forth in Section 10 of said ordinance by which under said Section 10 the exclusive feature has expired by limitation of time. And the court decrees that except as to said exclusive feature recited in said Section 10 of said ordinance, that the rights vested in complainant, the Des Moines City Railway Company, its successors and assigns, by said contract are perpetual.

And the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company.

It is further ordered, adjudged and decreed that the resolution passed by the city council of said city on or about November 21, 1905, and set out in Paragraph 32 of complainant's bill in this cause, is hereby cancelled, annulled, set aside, and held for naught, the same being in violation of the rights of complainant company, and of the obligation of the said contract.

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And it is further ordered, adjudged and decreed that the defendant, the City of Des Moines, and its City Council, and mayor, and city Solicitor, and all officers of said city, and those hereafter officers of said city, and each and all of them now holding office in said city, and all servants, agents and employés, and all successors in office be, and they are hereby perpetually enjoined from enforcing, or attempting to enforce said resolution, and from in any manner disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors and assigns, of any rights, privileges and franchises vested in complainant herein, and vested in any corporation or company or person from whom complainant by purchase or otherwise has acquired rights. And the said ordinance of December 10, 1866, and all amendments ther-to save and except the exclusive
105 feature of Section 10 thereof, shall be preserved perpetually to the complainant, its successors and assigns.

Any and all controversies now existing, or that may hereafter arise between the complainant, its successors or assigns, and the City of Des Moines as respects other ordinances than the one of December 10, 1866, and amendments thereto, are not adjudicated by this decree, and all questions relative to said other ordinances are not determined.

To each, all and every of which the defendant excepts.

This decree is made and entered of record to correct a clerical mistake in the decree entered March 22, 1907.

Done at Des Moines, Iowa, this March 30, 1907.

(Sgd.) SMITH McPHERSON, *Judge*.

(Endorsed:) Filed March 30, 1907. E. R. Mason, Clerk.

Ent. Book "U" pages 66 and 67.

106 And afterwards, to-wit, July 9, 1907, there was filed in said Clerk's office a Petition for Appeal in said Cause which is in words and figures as follows, to-wit:—

In the Circuit Court of the United States, Southern District of Iowa.
In Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Defendant.

Petition for Appeal.

To the Honorable Smith McPherson, District Judge for the Southern District of Iowa:

The above named defendant, feeling itself aggrieved by the decree made and entered in this cause on the 22nd day of March, A. D. 1907, and 30th day of March, A. D. 1907, does hereby appeal

SE IN CENTER

from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith; and defendant prays that its appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United Stated.

And your petitioner further prays that the proper order be made touching the security to be required of it to perfect its appeal.

(Sgd.) WM. H. BREMNER,
HOWARD J. CLARK,
WM. H. BAILY,
Solicitors for Defendant.

(Endorsed:) Filed July 9, 1907. E. R. Mason, Clerk.

107 & 108 Now to-wit, this 10th day of July, A. D. 1907, it is ordered that the petition is granted and the appeal allowed, upon giving bond conditioned as required by law, in the sum of One Thousand Dollars.

It is further ordered that the time for return of the said appeal is enlarged and extended until the first day of October, A. D. 1907, and defendant is granted until that time to make return thereof.

(Sgd.) SMITH McPHERSON,
District Judge, Southern District of Iowa.

(Endorsed:) Filed July 10, 1907. E. R. Mason, Clerk.
Ent. Book "U," page 97.

* * * * * * *

109 And afterwards, to-wit, July 10, 1907, there was filed in said Clerk's office in said Cause, an Assignment of Errors, which is in words and figures as follows, to-wit:—

In the Circuit Court of the United States, Southern District of Iowa, Central Division. In Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Assignment of Errors.

And now on this day came the respondent, City of Des Moines, by W. H. Bremner, Howard J. Clark, and Wm. H. Baily, its solicitors, and says that the decree entered in the above entitled cause on the 22nd day of March, A. D. 1907, and 30th day of March, A. D. 1907, is erroneous and unjust to respondent, and that there is manifest error therein in this, to-wit:—

1st. That the Circuit Court erred in finding the equities of this cause to be with the complainant.

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2nd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," and the amendments thereto, constitute a valid and subsisting contract between complainant and respondent.

3rd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," and set out as Exhibit "A" in complainant's complaint, and the amendments thereto,
110 constitute a valid and subsisting contract between the complainant and respondent.

4th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," and the amendments thereto, have been ratified and confirmed by the City of Des Moines.

5th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," set out as Exhibit "A" in complainant's complaint, together with the amendments thereto, has for years been construed by the respondent, the City of Des Moines, as granting a perpetual franchise to the complainant.

6th. That the Circuit Court erred in holding that the respondent municipality, City of Des Moines, Could, by acts or conduct on the part of its officers, in relation to or in connection with the ordinance of December 10, 1866, grant rights by such acts or conduct in addition to the rights expressly set forth in said ordinance of December 10, 1866.

7th. That the Circuit Court erred in holding that the complainant, the Des Moines City Railway Company, could obtain rights or grants not expressly granted in the ordinance of December 10, 1866, by the acts or conduct of the officers of the respondent municipality, the city of Des Moines, in connection with or in relation to said ordinance of December 10, 1866.

8th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," together with the amendments thereto, has for years been construed as one granting a perpetual franchise.

9th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, has been construed or otherwise treated by the respondent municipality, the City of Des Moines, or its officers, as in force or of any validity after the 1st day of January, 1898.

111 10th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Rail-

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roads in and along the Streets of the City of Des Moines," together with the amendments thereto, creates or constitutes a perpetual grant or contract between complainant and respondent.

11th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," together with the amendments thereto, still exist or are still in force.

12th. That the Circuit Court erred in holding and decreeing that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," except as to the exclusive feature recited in Section 10 of said ordinance, together with the amendments thereto, are perpetual in the complainant, its successors and assigns.

13th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant, or any of them, under the ordinance of December 10, 1866, as subsequently amended or modified, exist or were in force or effect after January 1, 1898.

14th. That the Circuit Court erred in holding that the rights, or any of them, vested in the complainant as assignee of the grantee in said ordinance, as subsequently amended or modified, are perpetual or were in force or existence after January 1, 1898.

15th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," as subsequently amended or modified, are impaired by the resolution of
112 November 21, 1905, which said resolution is complained of.

16th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violated or impaired any right or rights of complainant.

17th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Section 10 of Article I of the Constitution.

18th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Article 14 of the Amendment to the Constitution of the United States.

19th. That the Circuit Court erred in holding that the enforcement and execution of the resolution of November 21, 1905, (which resolution is complained of,) by the respondent in this case, deprives the complainant of its property without due process of law, in violation of Article 14 of the Amendment to the Constitution of the United States.

20th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, was in violation of the obliga-

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tion of any contract existing between the complainant and the respondent, and especially in holding that the same was in violation of the ordinance of December 10, 1866, as subsequently amended and modified.

21st. That the Circuit Court erred in ordering, adjudging and decreeing that the resolution complained of, of November 21, 1905, as set out and contained in Paragraph 32 of complainant's Bill, be cancelled, annulled, set aside, and held for naught.

22nd. That the Circuit Court erred in granting an injunction restraining the respondent and its officers from enforcing and executing, or attempting to enforce and execute the resolution of November 21, 1905, set out in Paragraph 32 of complainant's bill of complaint.

113 23rd. That the Circuit Court erred in granting an injunction restraining respondent and its officers from disturbing, impeding or interfering with the complainant in the enjoyment of the rights and privileges claimed by it under the ordinance of December 10, 1866, entitled "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines," as subsequently amended and modified.

24th. That the Circuit Court erred in granting an injunction, and ordering, adjudging and decreeing that the respondent, the City of Des Moines, its City Council and Mayor and City Solicitor, and all officers of said city and those hereafter officers of said city, and each and all of them now holding office in said city, and all servants, agents and employés, and all their successors in office, be enjoined from in any manner, disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors or assigns, of any rights, privileges and franchises vested in complainant, and vested in any corporation or company or person from whom complainant, by purchase or otherwise, has acquired rights.

25th. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of Section 10 thereof, shall be perpetual to the complainant, its successors and assigns.

26th. That the Circuit Court erred in granting an injunction, and adjudging and decreeing that the City of Des Moines and its officers, including the City Solicitor, be enjoined from bringing or maintaining an action or actions in court to ascertain and determine the respective rights of complainant and respondent.

27th. That the Circuit Court erred in ordering and decreeing that the respondent and its officers be enjoined from bringing or maintaining an action or actions in court to oust complainant from the streets, alleys, and public places of the respondent municipality.

111 28th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to test the rights of

complainant to operate street railways in the respondent municipality, the City of Des Moines.

29th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to ascertain and determine the rights of complainant to hold or exercise the franchises claimed by it.

30th. That the Circuit Court erred in not defining what rights, privileges and franchises were vested in the complainant under the various ordinances and franchises upon which it based its right to recover in this suit.

31st. That the Circuit Court erred in ordering and decreeing that the respondent and its officers and agents, and their successors in office, be enjoined from interfering with the free use and comfortable enjoyment of the complainant, its successors and assigns, of the rights, privileges and franchises vested in complainant, including the ordinance of December 10, 1866, as subsequently amended and modified, without finding adjudging and decreeing what rights the complainant had, and what rights existed under the ordinances and franchises as set out in the complainant's bill of complaint.

32nd. That the Circuit Court erred in not holding that the rights and privileges acquired and owned by the Des Moines City Railway under the ordinance of December 10, 1866, as subsequently amended and modified, expired on January 1, 1898.

33rd. That the Circuit Court erred in holding, adjudging and decreeing that the resolution of the City Council of the respondent city, passed on November 21, 1905, and set out in Paragraph 32 of complainant's bill of complaint, was a law.

34th. That the Circuit Court erred in holding that the City of Des Moines had the power or authority vested in it to grant a perpetual right or franchise to construct, operate or maintain a
115 street railway in and over the streets, alleys and public places in the City of Des Moines in perpetuity.

35th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, was vested with the power or authority to grant a right or franchise to construct, maintain and operate a street railway over or upon the streets, alleys and public places of the City of Des Moines.

36th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, had the power or authority on December 10, 1866, to grant a perpetual right to construct, maintain or operate a street railway upon, over or along the streets, alleys and public places of the City of Des Moines.

37th. That the Circuit Court erred in holding that the City of Des Moines was, at any time after December 10, 1866, granted or given the power or authority to grant or pass a franchise or ordinance or make a contract granting or vesting in any person, firm or corporation the right or privilege to construct, maintain or operate a street railway over, upon or along the streets, alleys and public places in the City of Des Moines, in perpetuity.

38th. That the Circuit Court erred in holding that the City of Des Moines at any time ever granted, ratified or confirmed any grant

in perpetuity, to construct, maintain or operate a street railway over, along or upon the streets, alleys and public places of the City of Des Moines.

39th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right to construct, maintain or operate street railways upon, along or over the streets, alleys and public places of the City of Des Moines under the ordinance of December 10, 1866, as subsequently amended and modified.

116 40th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right and privilege, granted to it by ordinance or otherwise, to construct, maintain or operate street railways upon, over or along the streets, alleys and public places in the City of Des Moines.

41st. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, as subsequently amended and modified, was a valid, subsisting contract between the complainant and the respondent, and that thereunder, the complainant had the right to construct, maintain and operate street railways over, along or upon the streets, alleys and public places of the City of Des Moines, which said right exists in perpetuity.

42nd. That the Circuit Court erred in refusing to determine the rights of complainant under each of the ordinances or franchises declared on in its bill of complaint.

43rd. That the Circuit Court erred in refusing to determine all of the questions at issue as tendered by the allegations of the bill of complaint and the allegations of the respondent's answer.

44th. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, or persons, which said several other ordinances are referred to in the bill of complaint of complainant."

45th. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company," without also stating and finding what other corporations and what other ordinances are intended or referred to, and without fixing and determining the rights of the parties under each of said ordinances and franchises.

117 46th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding or interfering with the use and enjoyment by complaint of rights, privileges or franchises other than those acquired or held under the ordinance of December 10, 1866, together with the amendments thereto.

47th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding and interfering with the use and enjoyment by complainant of rights, privileges or franchises under ordinances respecting which controversies existing or hereafter arising are said not to be adjudicated.

48th. That the Circuit Court erred in holding that all of com-

plainant's street railways were constructed or operated under authority of the ordinance of December 10, 1866.

49th. That the Circuit Court erred in holding that the resolution of November 21, 1905, is a law or legislative act.

50th. That the Circuit Court erred in holding that the resolution of November 21, 1905, was an attempt to repeal, amend or modify the ordinance of December 10, 1865, as subsequently amended or modified.

Wherefore, the respondent prays that said decree be reversed, and the Circuit Court directed to dismiss the bill of complaint.

(Sgd.) WM. H. BREMNER,
HOWARD J. CLARK,
WM. H. BAILY,
Solicitors for Respondent.

(Endorsed:) Filed July 10, 1907. E. R. Mason, Clerk.

118 And on the *dame* day, to-wit, July 10, 1907, there was filed in said Clerk's office in said Cause, *an* Bond on Appeal, which is in words and figures as follows, to-wit:—

In the Circuit Court of the United States, Southern District of Iowa.

DES MOINES CITY RAILWAY COMPANY, Complainant,
versus
CITY OF DES MOINES, Respondent.

Bond on Appeal.

Know all men by these presents:

That we, the City of Des Moines, in the State of Iowa, as principal, and G. W. Mattern and W. W. Wise, as sureties, acknowledge ourselves to be justly indebted to Des Moines City Railway Company, appellee in the above cause, in the sum of One Thousand Dollars, conditioned that, whereas, on the 22nd day of March, 1907, and 30th day of March, 1907, in the Circuit Court of the United States for the Southern District of Iowa, in a suit depending in said court wherein Des Moines City Railway Company was complainant and City of Des Moines, was defendant, a decree was rendered against the said City of Des Moines; and the said City of Des Moines having obtained an appeal to the Supreme Court of the United States to reverse the said decree and have a citation directed to said Des Moines City Railway Company citing and admonishing it to appear therein in said Supreme Court of the United States:

Now, if the said City of Des Moines shall prosecute its appeal to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

CITY OF DES MOINES,
(Sgd.) By W. H. BREMNER,
City Solicitors.

(Sgd.) G. W. MATTER.
W. W. WISE, *Sureties.*

119 Approved the 10th day of July, 1907.
(Sgd.) SMITH McPHERSON,
District Judge, Southern District of Iowa.

(Endorsed:) Filed July 10, 1907. E. R. Mason, Clerk.

120 And on the same day, to-wit, July 9, 1907, there was filed in said Clerk's office in said Cause, a Citation, which is in words and figures as follows, to-wit:

In the United States Circuit Court, Southern District of Iowa, Central Division.

The President of United States of America to the Des Moines City Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington in the District of Columbia thirty (30) days from and after the day this Citation bears date pursuant to an Appeal allowed and filed in the Clerk's office of the United States Circuit Court for the Southern District of Iowa wherein the City of Des Moines is appellant and the Des Moines City Railway Company is appellee to show cause, if any there be why the Decree rendered against the said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Smith McPherson, one of the Judges of said Court at Des Moines in said District, this 9th day of July, A. D. 1907.

SMITH McPHERSON,
District Judge.

Service of the foregoing citation acknowledged on this 26th day of August, 1907.

W. L. READ,
N. T. GUERNSEY,
GEO. H. CARR,
Solicitors for Des Moines City Railway Company.

[Endorsed:] Filed Jul- 9, 1907. E. R. Mason, Clerk.

121 United States Circuit Court, Southern District of Iowa.

I, Edward R. Mason, Clerk of said Court for said District, do hereby certify that the Volumes 1, 2, 3, 4, and 5 transmitted herewith, contain full, true and complete copies of the Pleadings, Proceedings and Record Entries, Depositions and Exhibits in a certain cause in said Court wherein the Des Moines City Railway Company was Complainant and the City of Des Moines was Respondent, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in the City of Des Moines in said District, this 27th day of August, A. D. 1907.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk of U. S. Circuit Court, Southern District of Iowa.

122 VOLUME II. E. R. MASON, CLERK.

The Complainant to maintain the issues upon its part introduced and read in evidence Depositions and Exhibits following which Depositions and Exhibits were in words and figures as follows, to-wit:

123 And afterwards, towit, June 14, 1905, there was filed in said Clerk's office in said Cause, the Deposition of R. N. Baylies on behalf of Plaintiff, which is in words and figures
124 as follows, to-wit:

Deposition of witness R. N. Baylies, taken before me, Alanson C. Noble, a notary public within and for Cook County and State of Illinois, on the 12th day of June, A. D. 1905, at the hour of ten o'clock in the forenoon of said day, said deposition to — used in behalf of plaintiff in a certain cause pending and undetermined in the Circuit Court of the United States in and for the Southern District of Iowa, central division, wherein the Des Moines City Railway Company is complainant and the City of Des Moines is respondent; said deposition being taken in pursuance of the stipulation of the parties hereto annexed upon the interrogatories attached to said stipulation and therein referred to (no cross interrogatories being attached).

Neither party was in attendance at the taking of said deposition by attorney, counsel or agent.

R. N. BAYLIES being by me first duly sworn to testify the truth, the whole truth and nothing but the truth respecting the matters inquired of, testified as follows:

Int. 1. State your name, age, residence, and occupation?

Ans. R. N. Baylies, Sixty (60) years old. Reside in Chicago, Cook County, Illinois, and am a lawyer.

Int. 2. Please state whether, during the years 1886 to 1890, you were engaged in the practice of law in the city of Des Moines, Iowa?

Ans. I was.

Int. 3. During the period in question what professional relations did you sustain with the Des Moines Broad Guage Street Railway Company and the Des Moines Electric Company?

Ans. I was attorney for the Des Moines Broad Guage Street Railway Company.

Int. 4. Please state whether you were the senior member
125 of the firm of Baylies & Baylies which appeared for the Des Moines Broad Guage Street Railway Company in the suit of Des Moines Street Railroad Company *vs.* Des Moines Broad Guage Street Railway Company involving the exclusiveness of the franchises held by the Des Moines Street Railroad Company in 1886, and also whether you were counsel for the Des Moines Broad Guage Street Railway Company in the case of Teachout against that com-

pany involving the right of that company to construct and operate an electric line in the city of Des Moines, in 1887?

Ans. I was.

Int. 5. What relation did you sustain to the Des Moines Electric Railway Company the grantee of the Des Moines Broad Guage Street Railway Company?

Ans. No special relationship other than this: During the negotiations for the sale of the Des Moines Broad Guage Street Railway, and the consolidation of the different properties in the Des Moines Street Railroad Company in September 1889, I believe, I was attorney for, and had charge of the affairs of the Broad Guage Street Railway Company, being President as well as attorney for that company, and our firm was also attorneys for the Des Moines & Sevastopol Street Railway Company. Incidentally to the final object of carrying these properties over to the Des Moines Street Railroad Company, I may have represented the Des Moines Electric Railway Company, but cannot state definitely.

Int. 6. Please state what connection you had with the sale of the property of the Des Moines Electric Railway Company and of the Des Moines & Sevastopol Street Railway Company to the
1256 Des Moines Street Railroad Company, which was made in September, 1889?

Ans. Baylies & Baylies were the attorneys for both Companies. I was also president of the former company and I had principal charge of the negotiations for the sale of the properties and attended personally to most of the details of that business up to the time that the sale was consummated and the properties carried over to the Des Moines Street Railroad Company.

Int. 7. Please state whether you were present at a meeting of the council of the city of Des Moines, held on September 5, 1889, when the following resolutions were adopted:

SECTION 1339. Whereas, Negotiations are now pending for the consolidation of the different street railroad companies in the city of Des Moines and it is believed that the general welfare of the city will be promoted by such consolidation; therefore, as an inducement to such consolidation, be it

Resolved, That in the event of such consolidation taking place between the Des Moines Street Railroad Company, the Des Moines Electric Street Railway Company, and the Des Moines-Sevastopol Street Railway Company so that said consolidated roads shall be operated under one management, the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter, on condition that the Des Moines Street Railroad Company will dismiss its suit against the City of Des Moines and the Des Moines Broad Guage Street Railway Company for damages growing out of the granting of certain franchises to the Des Moines Broad Guage Street Railway Company and the Des Moines Electric Railway Company, and in such event the matters in controversy between said several parties in said suit shall be regarded as fully and finally settled. Provided, that the company owning or operating such consolidated roads, shall accept such modification of exist-

ing franchises as will require it within a reasonable time, not exceeding twelve months, to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart, nor shall any tracks now being operated be taken up unless by permission of the Council, and, provided, further, that not more than two tracks shall be laid upon any street, and whenever tracks are laid
127 they shall be laid so as to leave as much room on either side as is practicable and such company shall also accept such other reasonable rules and regulations relating to the construction and operation of the road as the safety and convenience of the people may require.

SEC. 1340. Whereas, Negotiations are now pending for a consolidation of the different street railway companies of this city, and it is believed that the general welfare of the city will be promoted by such consolidation, therefore, as an inducement to such consolidation, be it

Resolved, That in the event of a consolidation being effected, between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines-Sevastopol Street Railway Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railways, now or hereafter constructed, by electricity or other practical motor power. This resolution shall not, however, be construed as authorizing the use of steam motors for propelling said company's cars.

Ans. I was present at that meeting.

Int. 8. Please state whether you were personally familiar with the facts as to the street railroad situation in Des Moines during the controversies between the various companies from 1886 until 1889.

Ans. I was.

Int. 9. During that period what construction was placed upon the Turner ordinance, being an ordinance passed December 10, 1866, and entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines" as to the duration of the right granted and as to any limitations upon this right by yourself and the other counsel who represented the various parties to these controversies including the counsel for the City of Des Moines?

Ans. My construction of that ordinance at that time was: that it granted the rights given without limitation as to time, and made these rights exclusive for thirty years, and we urged before
128 the courts that a grant of rights so broad, was unreasonable, and beyond the powers of the City Council. The Council representing the company holding under said ordinance also construed as granting a perpetual right, but differed from us as to the reasonableness of the grant. I believe that Council representing the City were in accord with my views; as the utmost harmony existed between us, throughout the litigation and I cannot recall any objection made to the construction stated.

Int. 10. Have you any recollection that anybody at any time including the period up to and after the consolidation of the various

companies in 1889 claimed or contended that the limitation of the exclusive right limited the general right to occupy the streets, or that this general right was not perpetual?

Ans. I have no recollection now, of any one at any time preceding the consolidation of the companies in 1889, claiming or contending that the limitation of the exclusive right limited the general right of the company to occupy the streets, or that the general right was not perpetual. On the contrary, so far as I can now remember the general opinion was that the ordinance granted the company the perpetual use of the streets, and made that right exclusive for thirty years.

Int. 11. Do you, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question — this cause?

129 If yea, set forth the same fully and at large in your answer?

Ans. I cannot now remember anything further that would be of benefit or advantage to either party.

(Sgd.) R. N. BAYLIES.

Subscribed and sworn to before me this 12th day of June 1906, by the said R. N. Baylies.

[SEAL.] (Sgd.) ALANSON C. NOBLE.
Notary Public.

130 Alanson C. Noble, a Notary Public duly commissioned in and for the County of Cook, and State of Illinois hereby certify that the foregoing deposition of the witness R. N. Baylies was taken before me in pursuance of the annexed stipulation upon the written interrogatories thereto attached, on the twelfth day of June, 1906 at the hour of Ten o'clock in the forenoon. That neither party was represented. That the several interrogatories were by me read to the witness and by me reduced to writing in his presence, and the answers of the witness were thereupon reduced to writing by me; that after all of the said interrogatories and answers thereto, had been so reduced to writing the same were by me read over to the witness who then and there subscribed and swore to the same. I am not related to the witness nor in any wise interested in the event of the suit.

In witness whereof, I hereunto subscribe my name and affix my Notarial seal at Cook County, Illinois, this 12th day of June, 1906.

[SEAL.] (Sgd.) ALANSON C. NOBLE.
Notary Public.

Notary Fees $10.00.

STATE OF ILLINOIS, *Cook County, ss:*

I, Peter B. Olsen, County Clerk of the County of Cook, Do Hereby Certify That I am the lawful custodian of the official record of Notaries Public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Alanson C. Noble, Esq.,

whose name is subscribed to the certificate to the annexed deposition, was, at the time of signing the same, and now is, a Notary Public in and for Cook County, duly commissioned sworn and acting as such, and authorized to administer oaths, and take depositions; all of which appears from the records and files in my office; I am well acquainted with his handwriting, and verily believe that the signature to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the city of Chicago, in the said County, this 13 day of June, 1906.

[SEAL.] (Sgd.) PETER B. OLSEN,
County Clerk.

131 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. —.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Stipulation.

It is hereby stipulated that the deposition of R. N. Baylies, a witness in behalf of the plaintiff in the above entitled cause, may be taken on the interrogatories and cross interrogatories hereto attached, before any notary public in and for Cook County, Illinois, and when so taken it shall be returned to the clerk of the above named court for use upon the trial of the above entitled cause, and may be used with the same force and effect therein as if the testimony of the said witness had been taken upon oral interrogatories and cross interrogatories before a duly appointed examiner, all informalities as to the manner of taking and return of the said deposition being hereby waived. No cross interrogatories.

(Sgd.) N. T. GUERNSEY,
GEO. H. CARR,
W. L. READ,
Solicitors for Complainant.

(Sgd.) W. H. BREMNER,
M. H. COHEN,
WM. McLAUGHLIN,
Solicitors for Respondent.

132 *Interrogatories to be Propounded to R. N. Baylies.*

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Interrogatories to be Propounded to the Witness, R. N. Baylies.

Interrogatory 1. State your name, age, residence and occupation?

Int. 2. Please state whether during the years from 1886 to 1889, you were engaged in the practice of the law in the city of Des Moines, Iowa?

Int. 3. During the period in question what professional relations did you sustain with the Des Moines Broad Guage Street Railway Company and the Des Moines Electric Railway Company?

Int. 4. Please state whether you were the senior member of the firm of Baylies & Baylies which appeared for the Des Moines Broad Guage Street Railway Company in the suit of Des Moines Street Railroad Company *vs.* Des Moines Broad Guage Street Railway Company involving the exclusiveness of the franchise held by the Des Moines Street Railroad Company in 1886, and also whether you were counsel for the Des Moines Broad Guage Street Railway Company in the case of Teachout against that company involving the right of that company to construct and operate an electric line in the city of Des Moines, in 1887?

133 Int. 5. What relation did you sustain to the Des Moines Electric Railway Company the grantee of the Des Moines Broad Guage Street Railway Company?

Int. 6. Please state what connection you had with the sale of the property of the Des Moines Electric Railway Company, and of the Des Moines & Sevastopol Street Railway Company to the Des Moines Street Railroad Company, which was made in September, 1889?

Int. 7. Please state whether you were present at a meeting of the council of the city of Des Moines held on September 5, 1889, when the following resolutions were adopted:

SECTION 1339. Whereas, Negotiations are now pending for the consolidation of the different street railroad companies in the city of Des Moines, and it is believed that the general welfare of the City will be promoted by such consolidation; therefore as an inducement to such consolidation, be it

Resolved, That in the event of such consolidation taking place between the Des Moines Street Railroad Company, the Des Moines Electric Street Railway Company, and the Des Moines-Sevastopol Street Railway Company so that said consolidated roads shall be operated under one management, the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter, on condition that the Des Moines Street Railroad

Company will dismiss its suit against the City of Des Moines and the Des Moines Broad Guage Street Railway Company for damages growing out of the granting of certain franchises to the Des Moines Broad Guage Street Railway Company and the Des Moines Electric Railway Company, and in such event the matters in controversy between said several parties in said suit shall be regarded as fully and finally settled. Provided, that the company owning or operating such consolidated roads shall accept such modification of existing franchises as will require it within a reasonable time, not exceeding twelve months to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart, nor shall any tracks now being operated be taken up unless by permission of the Council; and provided, further, that not more than two tracks shall be laid upon any street, and whenever tracks are laid they shall be laid so as to leave as much room on either side as is practicable, and such company shall also accept such other reasonable
131 rules and regulations relating to the construction and operation of the road as the safety and convenience of the people may require.

Sec. 1340. Whereas, Negotiations are now pending for a consolidation of the different street railway companies of this City, and it is believed that the general welfare of the City will be promoted by such consolidation, therefore, as an inducement to such consolidation, be it,

Resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines Sevastopol Street Railway Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railways now or hereafter constructed, by electricity or other practical motor power. This resolution shall not, however, be construed as authorizing the use of steam motors for propelling said company's cars.

Int. 8. Please state whether you were personally familiar with the facts as to the street railroad situation in Des Moines during the controversies between the various companies from 1886 until 1889.

Int. 9. During that period what construction was placed upon the Turner ordinance, being an ordinance passed December 10, 1886, and entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines" as to the duration of the right granted and as to any limitations upon this right by yourself and the other counsel who represented the various parties to these controversies including the counsel for the City of Des Moines?

Int. 10. Have you any recollection that anybody at any time including the period up to and after the consolidation of the various companies in 1889 claimed or contended that the limitation of the exclusive right limited the general right to occupy the streets, or that this general right was not perpetual?

135 Int. 11. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the

parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

(Endorsed:) Des Moines City Ry. *vs.* City of Des Moines. Depo. R. N. Baylies. Opened and filed June 14, 1906. E. R. Mason, Clerk.

136 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. —.

DES MOINES CITY RAILWAY COMPANY, Complainant,

vs.

CITY OF DES MOINES, Respondent.

Stipulation.

It is hereby stipulated that the deposition of N. W. Harris, a witness in behalf of the complainant in the above entitled cause, may be taken on the interrogatories and cross interrogatories hereto attached, before any notary public, and when so taken it shall be returned to the clerk of the above named court for use upon the trial of the above entitled cause, and may be used with the same force and effect therein as if the testimony of the said witness had been taken upon oral interrogatories and cross interrogatories before a duly appointed examiner, all informalities as to the manner of taking and return of the said deposition being hereby waived.

No cross interrogatories.

(Sgd.) N. T. GUERNSEY,
GEO. H. CARR,
W. L. READ,
Solicitors for Complainant.

(Sgd.) W. H. BREMNER,
M. H. COHEN,
WM. McLAUGHLIN,
Solicitors for Respondent.

137 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. —. Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Interrogatories.

The following interrogatories will be propounded to the witness N. W. Harris.

Interrogatory 1. Please state your name, age, and place of residence?

Int. 2. What relation do you sustain to the firm of N. W. Harris & Company, and what relations did you sustain to that firm at the times hereinafter mentioned?

Int. 3. Was the firm of N. W. Harris & Company engaged in business in 1889, and if so, where were its offices?

Int. 4. What was the nature of the business carried on by the form of N. W. Harris & Company in 1889, and what has been the nature of its business since that time?

Int. 5. Please state whether the firm of N. W. Harris & Company in 1889 purchased an issue of bonds of the Des Moines Street Railroad Company dated October 1st, 1889, secured by a trust deed on the property of the company. If so, please state how many of the said bonds were purchased by N. W. Harris & Company, and for what price.

Int. 6. State, if you know, where the trust deed is that secured the said issue on bonds and if the original of said trust deed
138 is now in the possession of the American Trust & Savings Bank, as trustee, will you please produce a copy of said trust deed and have it marked an exhibit to your deposition and return it as part thereof?

Int. 7. What did N. W. Harris & Company do with the bonds which were so purchased by them?

Int. 8. Will you please state whether or not N. W. Harris & Company in connection with the sale of these bonds to customers of that firm, issued a circular #507, and if so please produce a copy of this circular, have it attached to your deposition marked an exhibit and returned as part of it.

Int. 9. You will observe that this circular states that the property is operated under a perpetual charter, granted in 1866. Please state in this connection whether, in connection with the purchase of these bonds you were furnished with a copy of an ordinance passed December 10, 1866, by the city of Des Moines, entitled: "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines" granting railway rights to the Des Moines Street Railway Company, and

what you did in order to ascertain the duration and extent of the rights granted by this ordinance and what you believed to be the duration and nature of these rights when N. W. Harris & Company issued said circular?

Int. 10. State whether or not you would have purchased the bonds in question for N. W. Harris & Company if you had believed that the rights granted by the ordinance referred to expired January 1st, 1898?

139 Int. 11. Please state, if you know, how many of the issue of bonds above referred to, dated October 1st, 1889, are now outstanding and unpaid.

Int. 12. Are you informed as to an issue of Consolidated Mortgage 6% Bonds of the Des Moines City Railway Company dated May 1st, 1893, and maturing May 1st, 1923, and secured by a trust deed of the said company bearing even date with the said bonds given to the Illinois Trust and Savings Bank as trustee?

Int. 13. If you are please state whether or not, N. W. Harris & company purchased any of the bonds last above referred to and if so how many of them and for what price?

Int. 14. State, if you know, how many of the bonds last above referred to are outstanding, and whether the trust deed given to secure the same is now in the possession of the Illinois Trust and Savings Bank, Trustee, to secure the bonds still outstanding.

Int. 15. If you can do so, please produce a copy of this trust deed and have it attached to your deposition, identified therewith as an exhibit, and returned as a part of it.

Int. 16. State whether you would have purchased the bonds last above referred to, or any of them, for N. W. Harris & Company if you had believed that the rights of the Des Moines City Railway Company, as the assignee of the said ordinance of December 10, 1856, would expire on the first of January, 1898, or if you had believed that these rights were not perpetual.

Int. 17. Please state whether or not, in connection with the sale of these bonds to your customers, N. W. Harris & Company sent out various circulars, including those designated as =680 and =722; and if so, please produce those circulars and have them identified as exhibits and returned as parts of your deposition.

140 Int. 18. I call your attention to the statements in circular =680 to the effect that all questions relating to this bond issue, including franchise rights, had been passed upon and approved by your counsel, a copy of whose opinion "Will be furnished with the bonds." And the statement in circular =722 that the "franchise rights of the company are practically perpetual," and ask you to state whether, at the time you bought these bonds, you had the opinion of counsel that the franchise rights in question were perpetual and to what extent you relied upon this opinion and whether N. W. Harris & Company would have purchased said bonds in the absence of such right in the company.

Int. 19. If you can produce a copy of this opinion, please do so; and if you cannot, please explain your inability to do so.

Int. 20. Are you informed as to an issue of bonds made by the

Des Moines City Railway Company, dated April, 1st, 1901, and due April 1st, 1921, designated as "its refunding mortgage 5% Gold Bonds," and secured by a trust deed to the Illinois Trust & Savings Bank and William H. Henkle, Trustees?

Int. 21. Please state whether or not N. W. Harris & Company purchased these bonds or any of them, and if they did purchase any of them, please state how many of them they purchased and at what price.

Int. 22. State whether or not the trust deed securing these bonds is still in the possession of the Illinois Trust & Savings Bank as trustee to secure the outstanding bonds; and if it is, please produce a copy of it, have it identified as an exhibit and returned as part of your deposition, if you can do so.

141 Int. 23. Please state whether or not, in connection with the sale of these bonds to your customers, N. W. Harris & Company issued circulars designated as =1124, =1291, =1291A, 1353, =1416 and =1441, and if so please produce them and have the circulars identified by the notary as exhibits and attached to your deposition and returned as parts of it.

Int. 24. I call your attention to the fact that each of these circulars says in substance that the franchise of the Company is perpetual and that it has been passed upon by your attorney. Please state whether N. W. Harris & Company would have purchased these bonds if it had believed that the franchise in question was not perpetual, but terminated January 1st, 1898.

Int. 25. Please state whether or not, in connection with the purchase of these bonds, you were furnished with a copy of the Revised Ordinances of 1900 of the City of Des Moines, and if so please produce the same.

Int. 26. Please state whether this copy of the Ordinance of the City of Des Moines was furnished to the counsel who represented N. W. Harris & Company in the matter of the bond issue last referred to.

Int. 27. Also please state in this connection, whether any other copies of the Ordinances of the City of Des Moines than those contained in the said book were furnished him at that time.

Int. 28. Please state how many of this series of bonds, last above referred to, are now outstanding.

Int. 29. Please state when you first learned that it was claimed that the franchise of the Des Moines City Railway Company, under the original grant of December 10, 1866, was not perpetual.

142 Int. 30. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If you, set forth the same fully and at large in your answer.

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

No. —. Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Answers of N. W. Harris.

STATE OF ILLINOIS, *County of Cook, ss:*

Be it remembered that on this thirteenth day of June, A. D., 1906, personally appeared before me, F. R. Elliott, a Notary Public in and for the County of Cook and State of Illinois, Norman W. Harris to testify on the part of the complainant in the above entitled cause, and the said Norman W. Harris, having first been duly sworn to testify the truth, the whole truth and nothing but the truth, in the cause aforesaid, did depose and say as follows, to wit:

Interrogatory 1. Please state your name, age, and place of residence?

Answer. My name is N. W. Harris; age fifty-nine years; and I reside in the City of Chicago, State of Illinois.

Int. 2. What relation do you sustain to the firm of N. W. Harris and Company, and what relations did you sustain to that firm at the times hereinafter mentioned?

Ans. I am the senior partner of the firm of N. W. Harris and Company and have sustained that relation to it since prior to the year 1889.

111 Int. 3. Was the firm of N. W. Harris & Company engaged in business in 1889, and if so, where were its offices?

Ans. Yes. Its offices were located in Chicago, New York and Boston.

Int. 4. What was the nature of the business carried on by the firm of N. W. Harris & Company in 1889, and what has been the nature of its business since that time?

Ans. N. W. Harris & Company were in 1889, and since that time have been, private bankers, their business including buying and selling the bonds of municipal and railroad and public service corporations.

Int. 5. Please state whether the firm of N. W. Harris & Company in 1889 purchased an issue of bonds of the Des Moines Street Railroad Company, dated October 1st, 1889, secured by a trust deed on the property of the company. If so please state how many of the said bonds were purchased by N. W. Harris & Company, and for what price?

Ans. N. W. Harris & Company did purchase the bonds referred to. The bonds were each for one thousand dollars. It purchased

six hundred of these bonds and paid therefor in cash ninety-five per cent. (95%) of their par value plus accrued interest.

Int. 6. State, if you know, where the trust deed is that secured the said issue of bonds and if the original of said trust deed is now in the possession of the American Trust & Savings Bank, as trustee, will you please produce a copy of said trust deed and have it marked an exhibit to your deposition and return it as part thereof?

Ans. The original trust deed securing the said issue of bonds is now in the possession of the American Trust & Savings Bank, as trustee. A few of these bonds are still outstanding. I now produce a copy of this trust deed and it is marked exhibit "A" to this
145 deposition and returned as a part of it.

Int. 7. What did N. W. Harris & Company do with the bonds which were so purchased by them?

Ans. N. W. Harris & Company sold them to numerous investors in the United States, principally in the eastern states.

Int. 8. Will you please state whether or not N. W. Harris & Company in connection with the sale of these bonds to customers of that firm, issued a circular = 563, and if so please produce a copy of this circular, have it attached to your deposition, marked an exhibit and returned as part of it.

Ans. N. W. Harris & Company did issue such a circular and I now produce a copy of the same which is marked exhibit "B" and attached to my deposition and returned as a part of it.

Int. 9. You will observe that this circular states that the property is operated under a perpetual charter, granted in 1865. Please state in this connection whether, in connection with the purchase of these bonds you were furnished with a copy of an ordinance passed December 10, 1866, by the city of Des Moines, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines" granting railway rights to the Des Moines Street Railway Company, and what you did in order to ascertain the duration and extent of the rights granted by this ordinance and what you believed to be the duration and nature of these rights when N. W. Harris & Company issued said circular?

Ans. In connection with the purchase of the bonds in question N. W. Harris & Company was furnished with a copy of the ordinance referred to.

As to the duration and extent of the rights granted by this
146 ordinance and the nature of these rights N. W. Harris & Company relied upon the opinions of counsel who had charge of the matter. Also, I think in this connection we were furnished an opinion that had been given Mr. Galusha Parsons, a lawyer then residing in Des Moines who was said to be a lawyer of high standing which was concurred in by Mr. J. S. Polk.

Int. 10. State whether or not you would have purchased the bonds in question for N. W. Harris & Company if you had believed that the rights granted by the ordinance referred to expired January 1st, 1898?

Ans. No.

Int. 11. Please state, if you know, how many of the issues of bonds above referred to, dated October 1st, 1889, are now outstanding and unpaid?

Ans. Of these bonds there are now outstanding and unpaid Three hundred ninety thousand dollars ($390,000) par value.

Int. 12. Are you informed as to an issue of Consolidated Mortgage 6% Bonds of the Des Moines City Railway Company, dated May 1st, 1893, and maturing May 1st, 1923, and secured by a trust deed of the said company bearing even date with the said bonds, given to the Illinois Trust and Savings Bank as Trustee?

Ans. Yes.

Int. 13. If you are, please state whether or not N. W. Harris & Company purchased any of the bonds last above referred to and if so how many of them and for what price?

Ans. Yes, N. W. Harris & Company purchased at various times a total of Two Hundred ninety-one (291) of the bonds in question, each of the denomination of one thousand dollars and paid for them in cash various prices, ranging from eighty (80) per cent. of
147 their par value in January 1894, immediately after the panic of 1893 to one hundred (100) per cent. of their par value in 1901, plus accrued interest.

Int. 14. State, if you know how many of the bonds last above referred to are outstanding, and whether the trust deed given to secure the same is now in the possession of the Illinois Trust & Savings Bank, Trustee, to secure the bonds still outstanding.

Ans. Four thousand dollars ($4,000) par value of the bonds last above referred to are outstanding and the trust deed given to secure the same is now in the possession of the trustee named to secure the said outstanding bonds.

Int. 15. If you can do so, please produce a copy of this trust deed and have it attached to your deposition, identified therewith as an exhibit, and returned as a part of it.

Ans. I now produce a copy of this trust deed and it is attached to my deposition identified as exhibit "C" thereto and returned as a part of it.

Int. 16. State whether you would have purchased the bonds last above referred to, or any of them for N. W. Harris & Company if you had believed that the rights of the Des Moines City Railway Company, as the assignee of the said ordinance of December 10, 1866, would expire on the first of January 1898, or if you had believed that these rights were not perpetual?

Ans. No.

Int. 17. Please state whether or not, in connection with the sale of these bonds to your customers, N. W. Harris & Company sent out various circulars, including those designated as #690 and #722; and if so, please produce these circulars and have them identified as exhibits and returned as parts of your deposition.

148 Ans. Yes, and I now produce copies of circulars No. 690 and 722 which are identified as exhibits "D" and "E," respectively and returned as a part of this deposition.

Int. 18. I call your attention to the statements in circular #690

to the effect that all questions relating to this bond issue, including franchise rights, had been passed upon and approved by your counsel, a copy of whose opinion "will be furnished with the bonds" and the statement in circular =722 that the "franchise rights of the company are practically perpetual" and ask you to state whether, at the time you bought these bonds, you had the opinion of counsel that the franchise rights in question were perpetual and to what extent you relied upon this opinion and whether N. W. Harris & Company would have purchased said bonds in the absence of such right in the company?

Ans. We relied wholly upon the opinion in question and N. W. Harris & Company would not have purchased the bonds referred to if it had not believed that the franchise rights of the company were perpetual.

Int. 19. If you can produce a copy of this opinion, please do so; and if you cannot, please explain your inability to do so.

Ans. I cannot produce a copy of the opinion referred to. I have had diligent search made for it but do not find it. The only theory upon which I can explain its absence is that it has either been lost between the various offices of N. W. Harris & Company, or has been furnished to some purchaser of the bonds and not returned.

Int. 20. Are you informed as to an issue of bonds made by the Des Moines City Railway Company, dated April 1st, 1901,
149 and due April 1st, 1921, designated as "its Refunding Mortgage 5% Gold Bonds," and secured by a trust deed to the Illinois Trust & Savings Bank and William H. Henkle, Trustees?

Ans. Yes.

Int. 21. Please state whether or not N. W. Harris & Company purchased these bonds or any of them, and if they did purchase any of them, please state how many of them they purchased and at what price.

Ans. N. W. Harris & Company purchased Two million one hundred ninety-five thousand dollars ($2,195,000) par value of these bonds at various times under various contracts, paying in cash for them various prices, ranging from ninety per cent. (90%) of their face value and accrued interest to ninety-seven and one-half per cent. (97½%) of their face value and accrued interest in accordance with the terms of the respective contracts covering the purchase of the same?

Int. 22. State whether or not the trust deed securing these bonds is still in the possession of the Illinois Trust & Savings Bank as trustee to secure the outstanding bonds; and if it is, please produce a copy of it have it identified as an exhibit and returned as part of your deposition, if you can do so.

Ans. The trust deed is still in the possession of the trustee named to secure the outstanding bonds. I now produce a copy of it which is identified as exhibit "F" to this deposition and is returned herewith.

Int. 23. Please state whether or not, in connection with the sale of these bonds to your customers, N. W. Harris & Company issued circulars designated as =1124, =1291, =1291A, 1353, =1416

and #1444 and if so please produce them and have
150 the circulars identified by the notary as exhibits and attached to your deposition and returned as parts of it.

Ans. In connection with the sale of these bonds to their customers, N. W. Harris & Company issued circulars #1124, #1291, #1291A, 1353, #1416 and #1444 and I now produce copies of them and they are identified by the notary respectively as exhibits "G" "H" "I" "J" "K" and "L" and are attached to this deposition and returned as part of it.

Int. 24. I call your attention to the fact that each of these circulars says in substance that the franchise of the company is perpetual and that it has been passed upon by your attorney. Please state whether N. W. Harris & Company would have purchased these bonds if it had believed that the franchise in question was not perpetual, but terminated January 1st, 1898?

Ans. N. W. Harris & Company would not have purchased the bonds in question if it had not believed that the franchise in question was perpetual, but had believed it was not perpetual and terminated in 1898.

Int. 25. Please state whether or not, in connection with the purchase of these bonds, you were furnished with a copy of the Revised Ordinances of 1900 of the City of Des Moines, and if so please produce the same.

Ans. Yes, and I now produce the same for inspection as exhibit "M."

Int. 26. Please state whether this copy of the ordinances of the city of Des Moines was furnished to the counsel who represented N. W. Harris & Company in the matter of the bond issue last referred to?

Ans. Yes.

Int. 27. Also please state in this connection, whether any
151 other copies of the ordinances of the City of Des Moines than those contained in the said book were furnished him at that time.

Ans. No, So far as I remember.

Int. 28. Please state how many of this series of bonds, last above referred to, are now outstanding?

Ans. Two million two hundred sixty-five thousand dollars ($2,265,000) par value bonds.

Int. 29. Please state when you first learned that it was claimed that the franchise of the Des Moines City Railway Company, under the original grant of December 10, 1865, was not perpetual?

Ans. At about the time some *quo warranto* suits were commenced in September 1905.

Int. 30. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. With the exception of a comparatively small number of them, now held by N. W. Harris & Company, all of the bonds pur-

chased by N. W. Harris & Company and referred to in this deposition, have been sold to investors scattered over numerous states in the United States and are held by them as investments. N. W. Harris & Company at all times believed that the franchise was perpetual and made this representation to its customers believing it to be true, and a large number, if not all of these bonds, have been bought upon the faith of these representations, and in the belief that the franchise referred to is perpetual.

Signature of Witness:

(Sgd.) N. W. HARRIS.

152–799 STATE OF ILLINOIS, *County of Cook, ss:*

I, F. R. Elliott, a Notary Public, in and for the County of Cook and State of Illinois, do hereby certify that on the thirteenth day of June, A. D. 1906, in pursuance of the annexed stipulation, personally appeared before me in my office at Chicago, Illinois, Norman W. Harris, witness, to testify on behalf of the complainant in a certain cause now pending in the Circuit Court of the United States, in and for the Southern District of Iowa, Central Division, wherein Des Moines City Railway Company is complainant and the City of Des Moines respondent, and I do hereby further certify that the aforesaid witness was first duly sworn to testify the truth in relation to the matter in controversy in the cause aforesaid so far as he should be interrogated, and that the testimony of said witness was reduced by me to writing and was carefully read to and subscribed by said witness in my presence, and I do further certify that the various exhibits referred to by said witness in his testimony are hereunto annexed and marked as specified in said testimony.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal this thirteenth day of June, A. D. 1906.

(Sgd.) F. R. ELLIOTT,
[SEAL.] *Notary Public.*

Commission expires October 9th, 1906.

STATE OF ILLINOIS, *County of Cook, ss:*

I, F. R. Elliott a notary public in and for the County and state aforesaid do hereby certify that when the attached deposition was taken by me, neither the attorney nor the agent of either party to the matter in controversy was present. Witness my hand and Notarial Seal this 13th day of June, A. D. 1906.

(Sgd.) F. R. ELLIOTT,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Jun- 25, 1906. E. R. Mason, Clerk.

* * * * * * *

800 VOLUME III. E. R. MASON, CLERK.

The Complainant to maintain the issues upon its part introduced in evidence the Following Exhibits, which Exhibits were in words and figures as follows: to-wit:

801 United States Circuit Court, Southern District of Iowa.

DES MOINES CITY RAILWAY COMPANY
vs.
CITY OF DES MOINES.

PLAINTIFF'S ORIGINAL EXHIBITS No. 1 to No. 99. VOL. "I."

802 EXHIBIT No. 1. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Articles of Incorporation of the Des Moines Street Railway Company.

Adopted Oct. 1, 1886.

Know all men by these presents, That we, M. P. Turner, U. B. White, J. S. Polk and F. M. Hubbell of Polk County, Iowa, do associate ourselves together as a body corporate for the purpose of constructing, operating, owning and maintaining a Railway in the Streets of the City of Des Moines, Polk County, Iowa and we do hereby ordain, adopt and subscribe the following articles of association for the organization and government of said Company, towit:

Article I.

The name of said Company shall be the Des Moines Street Railway Company and in such name all the business of said Company shall be conducted.

Article II.

The business of such corporation shall be that of constructing, operating owning and maintaining Railways on the several streets in the City of Des Moines.

Article III.

The Capital Stock of said Company shall be the sum of One Hundred Thousand Dollars which shall be divided into one thousand shares. Provided that the Capital Stock may at any time be increased to Two Hundred and Fifty Thousand Dollars by a vote of the Stock holders representing over one half of the Capital Stock

time to time in installments as may be required by the Directors of said Company for building and operating their said roads and for otherwise conducting their business.

803 Article IV.

The said corporation shall commence on the date of the execution of these articles and continue for the term of fifty years.

Article V.

There shall be elected at the first regular meeting of the Stockholders of said Company, a President, a Vice President and Secretary and a Treasurer and Superintendent who shall hold their office respectively until the first Monday in January, 1867, at which time and annually thereafter an election shall be held for such officers and said officers when duly elected and qualified shall constitute the Board of Directors of said Company, under whose supervision and control the business of said Company shall be conducted, and shall receive such compensation for their services as from time to time may be allowed them by said Company, Provided that the Treasurer of said Company before entering upon the duties of his office shall give bond in such sums as the Company may from time to time require.

Article VI.

Said Company may for the purposes of its organization, make all needful contracts and purchase acquire hold and dispose of personal and real property as fully as a private person.

Article VII.

The Highest amount of indebtedness or liability to which the corporation is at any time to subject itself is Twenty Five Thousand Dollars.

Article VIII.

The private property of the members of said Corporation shall be exempt from liability for the debts of the Corporation.

Article IX.

Said Company shall have a Common Seal which they may alter or change from time to time as they may desire.

Article X.

Said Company shall have the power to establish by-laws and make all rules and regulations deemed expedient for the management of their affairs in accordance with law.

804–877 Article XI.

Board of Directors may order for the election of officers and the transaction of the business of said Company, and at such meetings, the Stockholders of said Company shall be entitled to one vote for each share of stock owned by them.

Witness our hands this 1st day of October 1866.

5c Stamp. FMH. Oct. 1st. 1866.

M. P. TURNER.
C. B. WHITE.
F. M. HUBBELL.
JEFF S. POLK.

STATE OF IOWA, *Polk County, ss:*

Before me S. G. Hubbell, a Notary Public within and for said County and State this day personally appeared, M. P. Turner, C. B. White, F. M. Hubbell and J. S. Polk to me personally known to be the identical persons whose names are affixed to the foregoing instrument as makers thereof and acknowledged the execution thereof to be their voluntary act and deed.

Witness my hand this 10th day of November, 1866.

[SEAL.] S. G. HUBBELL.
Notary Public, Polk Co., Iowa.

Filed for record Dec. 10, 1866, at 4 o'clock P. M. and recorded in Record of Incorporations, Pages 101 and 102.

JOHN JACK, Jr.,
Recorder for Polk Co., Iowa.

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

* * * * * * *

878 EXHIBIT No. 12. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An Ordinance Authorizing the Construction, Extension, and Operation of Certain Passenger Railways in and upon the Streets of the City of Indianapolis.

SECTION 1st. Be it ordained by the Common Council of the City of Indianapolis, that under and by virtue of an act of the General Assembly of the State of Indiana, entitled an act to provide for the incorporation of Street Railroad Companies approved June 4th 1861; and by virtue of the powers and authority of the Common Council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the Company organized with R. B. Catherwood as president, a body politic and corporate, by the name of the Citizens Street Railway Company of Indianapolis

Railway lines with all necessary and convenient tracks, for turnouts, side tracks and switches, in upon and along the course of the streets and alleys of the City of Indianapolis hereinafter mentioned; and to keep, maintain, use and operate thereon Railway Cars, and carriages in the manner and for the time and upon the conditions hereinafter prescribed.

SECTION 2. The said Company is hereby as above mentioned authorized to lay a single or double track for such Railway Lines upon and along the course of the following named streets in said City, and to extend the same as follows:

1. Meridian Street, Pennsylvania Street, Delaware Street, Alabama Street, New Jersey Street, East Street, Liberty Street, Noble Street, Benton Street, Railroad Street, Davidson Street, Winston Street, Jackson Street, Broadway Street, Plum Street, Illinois Street, Tennessee Street, Mississippi Street, Missouri Street, West Street, California Street, Blackford Street, Bright Street, Douglass Street, Blake Street, Elizabeth Street, First Street, St. Mary's Street,
879 St. Joseph Street, Cherry Street, Pratt Street, St. Clair Street, Walnut Street, North Street, Michigan Street, Vermont Street, New York Street, Ohio Street, Circle Street, Market Street, Washington Street, Maryland Street, Georgia Street, Louisiana Street, South Street, Merrill Street, McCarty Street, Ray Street, Union Street, Bicking Street, Indiana Avenue, Massachusetts Avenue, Kentucky Avenue, Virginia Avenue, Fort Wayne Avenue, (or road), Madison Avenue, (or road), Fletcher Avenue, Michigan Road, East, Michigan Road West, Bluff Road, Meek Street, Lord Street, East Georgia Street, Bates Street, Harrison Street, Pine Street, Cedar Street, Grove Street, Elk Street, Forest Avenue, Huron Street, Elm Street, Hosbrook Street, High Street, Sinker Street, Duncan Street, Wilkens Street, McNabb Street, Henry Street, Catherine Street, McGill Street, Cottrell Street, Ellis Street, Cady Street, Lockerbie Street, Powell Street, Agnes Street, Minerva Street, Hiawatha Street, Barnhill Street, Wilson Street, Maxwell Street, Patterson Street, Harris Street, Dunlop Street, Center Street, Ellen Street, West Elizabeth Street, Rhode Island Street, Margaret Street, Davis Street, Coe Street, Maria Street, Smith Street, Locke Street, Rathbone Street, Athon Street, James Street, Chatham Street, Arch Street, Vine Street, Cross Street, John Street, Oxford Street, East Second Street, Charles Street, with their present and future extensions and connections.

Section 2d, upon such thirty feet alleys only fronting on which said Company have any Depot, station, stable or car house.

SECTION 3. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no Railway car or carriage used upon any other Railway in this State, shall be used upon any of said tracks.

SECTION 4. The said tracks and Railways shall be used for no other purpose than to transport passengers and their ordinary baggage, and the Cars and Carriages for that purpose shall be the best style and class used on such Railways in other cities. The Common

Council shall have the power at all times to make such regu-
880 lations as to the rate of speed and time of running such Cars or Carriages, as the public safety, and convenience may require, and to affix penalties for violations of such regulations.

SECTION 5. The track of any such Railway shall not be elevated above the surface of the street, and the same shall be laid so as to conform to the established grades of the streets of said city, and in such manner as to be no unnecessary impediment to the ordinary use of the streets, and the passage of Wagons, carriages and other vehicles upon, along or across said track at any point and in any and all directions, with suitable bridges at all the gutters so as to permit the free and unimpeded flow of water in and along said gutters. The said Company shall boulder the space between the rails of the track, and also pave boulder or otherwise improve as the street may be two feet on the outside of each rail, so as at all times to correspond with the street outside, and keep the same together with all bridges at the coping of gutters, in good repair to the satisfaction of the Common Council, and in case of the failure of said Company to do the same, the Common Council shall have the right to prevent the use of said track by removing the rails therefrom.

SECTION 6. All tracks of any such Railway, shall be of uniform guage not exceeding five feet in width and shall be composed of the most approved rail. The Common Council of said city shall at any time, have the power to order the said Company to cause any such track or tracks to be taken up and relaid whenever, it shall be necessary for the purpose of regrading any street, constructing sewers or laying water or gas pipes therein. And the said Company shall be liable for all legal consequential damages which may be sustained by any person by reason of the carelessness negligence or misconduct of any of the agents or servants, of said Company in the course of their employment in the construction or use of the Railways aforesaid, any or either of them.

SECTION 7. No rights heretofore vested in the Indianapolis Gas
881 Light and Coke Company or other corporations are to be impaired or affected by anything herein contained, but the rights and privileges hereby granted are subject thereto.

SECTION 8. The said City of Indianapolis shall not be held liable to said Company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes or the necessary repairing of the same, or from the improvement of repair of any street, unless there be unreasonable delay in making such repair.

SECTION 9. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and where a double track is contemplated in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street; and said tracks shall not be laid within —— feet of the sidewalk upon any street, in any case where it is practicable to be avoided; and where any line of said Railway shall be extended along and upon any thirty feet alley, a

single track only shall be laid, and no side tracks, switches or *turn*-outs (except in cases where turn outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets) shall be allowed on any such alley : provided, however, that if said Company shall have its Depots, stations, or car houses located on any lot fronting on any such thirty feet alleys, they shall have the privilege of laying down turn out tracks leading from such alleys into such Depots, Stations, Stables, or Car houses.

SECTION 10. The rate of fare upon any line or route of Railway shall not exceed five cents for each passenger for any distance. The Common Council reserves the right to define what shall constitute a line or route, in accordance with the rates and usages of Railways in other cities.

SECTION 11. The President and Secretary of said Company shall, on the first day of January in each year, furnish to the City Assessor a full and complete list of the stockholders thereof, together with a statement showing the number of miles and parts of miles of track of Railway constructed, and used by said Company, and
882 the value thereof, the number and value of cars or carriages and horses or mules, owned and used by said Company in operating their Street Railways, and a statement showing the quantity and value of all other personal property owned by said Company and used by them in operating their Street Railways, which lists and statements shall be verified by the oaths of the President and Secretary of said Company to be administered by a Notary Public of the county of Marion and attested by his Seal or by any other person authorized to administer oaths. The City Assessor shall thereupon enter upon the return of taxable property the value of the personal property so reported as other personal property is returned for taxation and the City Clerk shall enter the same on the tax duplicate and charge up against said Company the amount of taxes due thereon, as other taxes are charged upon other personal property and the City Treasurer shall collect such taxes so assessed as other taxes are collected: provided, that each line of Railway shall be exempt from all taxation for the two years immediately following its completion, and no longer.

SECTION 12. The Cars or carriages shall be run upon and along the tracks of such Railways in conformity with the following rules and regulations:

1. No care shall be drawn at a greater speed than six miles an hour.

2. While the cars are turning the corner from one street to another the horses or mules shall not be driven faster than a walk.

3. Cars driven in the same direction, shall not approach each other within a distance of two hundred feet except in case of accident, or where cars are near, or at stations.

4. No car shall be left or remain standing on any street any time, unless the same is attached to a train, and is waiting for passengers.

5. No car shall be allowed to stop on a cross walk, nor in front of any intersecting street, except to avoid collisions or to prevent danger to persons in the street, or to take on or leave off passengers.

6. The conductors and drivers employed by said Company shall use care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the car
883 shall be stopped as quickly as possible.

7. All proper care should be used by conductors and drivers to * * * vehicles.

8. The conductors shall not allow ladies or children to enter the cars while in motion.

9. The Conductors shall announce to passengers, in a distinct tone the names of all streets crossed by said Railway as soon as the Cars shall have approached such cross street, and they shall observe the same rule when nearing the place where the cars cross in connection with any other Railway track and when nearing the Union Passenger Depot.

10. The cars after sunset shall be provided with signal lights.

11. No car shall remain standing at any station more than ten minutes, except at stations for watering the mules or horses and at each end of the Railway lines and at the station near the Union Passenger Depot, on Louisiana Street, at which Stations they may remain standing not exceeding fifteen minutes.

SECTION 13. The cars of said Company shall be entitled to the track, and in all cases wherein any team or vehicle shall meet or be overtaken by a car upon either of the Street Railways of said City, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said Railway Cars, by placing, driving or stopping, or causing to be placed, or driving in a slow pace or stopped any team, vehicle or other obstacle in, upon, across, along or near the track of said Railways, or either of them in said City after being notified by the driver or conductor, by the ringing of the car bell, or otherwise; and whosoever shall willfully violate any of the provisions of this section, of this Ordinance shall upon conviction thereof before the Mayor of said City, be fined in any sum not less then five or more than fifty dollars.

SECTION 14. This Charter is granted and the rights and privileges herein confined are subject to the following conditions and qualifications, to wit: That said Company shall have at least three miles of said Railway fully completed and equipped, and Cars running upon the same, by the first day of October, Eighteen hundred and Sixty four, that they shall have two (2) additional miles so
884 completed and equipped by the first day of October, Eighteen Hundred and Sixty Five, and two (2) additional miles making in all seve- miles fully completed and equipped, and cars running thereon, by the twenty fifth day of Dec., Eighteen hundred and Sixty six, unless the Common Council of said City shall grant to said Company a further extension of time; and on the failure of said Company to construct the number of miles of said Railway, within the time herein specified all rights and privileges herein granted, and all work done upon said Railway shall be forfeited and revert to the City of Indianapolis provided, that if said Company is delayed in the construction of said Railway by the order or in-

junction from any court or Judge thereof the time of such delay shall be given to said Company, over and above the time given by this section, for the completion of each given number of miles of said Railway, provided, however, that all the officers and directors of said company shall take and subscribe an oath, that such restraining order or injunction was not instigated or procured, directly or indirectly, by or with the consent suggestion or procurement, or in any other way or manner, of *their* or any of them, nor for or by them, to obtain an extension of time but that the said proceedings were instituted in opposition to their will and desire, and that they have promptly used all the means in their power to have the same rescinded or dissolved at the earliest period possible.

SECTION 15. The right to operate said railway shall extend to the full time of thirty years from the passage hereof and the said City of Indianapolis shall not during all the time to which the privileges hereby granted to said Company shall extend, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to the said Company; provided, however, that when ever the Common Council may deem it expedient that a line of Street Railway should be constructed along any street or streets, or part of a street upon which said Company, has not constructed any line of Street Railway and after the time shall have expired for the construction of the number of miles of Street Railway, as provided in the fourteenth section of this ordinance, they may declare the same by resolution, and order
885 and direct that said Company shall construct the same and it shall be the duty of the City Clerk, to serve a copy of such resolution, attested by the Mayor and City Clerk, upon the President, or in his absence upon any other officer or director of said Company and it shall be the duty of said *Common* Company within thirty days after the service of such notice, to officially certify to the Common Council a copy of a resolution of their board of directors, ordering the construction of said line of Street Railway, *without* the affidavit of the President attached, that it is the design in good faith of said company to proceed immediately to the construction of said line of Street Railway; and on failure to do so, the Common Council may by resolution, declare all privileges and rights of way over and to said line of Street Railway designated in the resolution, requiring its construction as forfeited, should said Company *to* certify their intention to proceed with the immediate construction of said line of Street Railway, a period of time therefor shall be allowed for such construction equal to thirty days for each one thousand feet of such proposed line of Street Railway not have been constructed, and in running order the Common Council may by resolution, declare all privileges and rights of way over and to the proposed line of Street Railway as forfeited, and the Common Council may themselves construct such line of Street Railway, or grant the right of way to any other person or association as fully and entirely as if this grant had never been made, and said Common Council person or association, to the extent necessary for the proper construction and running of such line of Street Railway may cross any track laid

under this grant, provided further, should not the Common Council, within twelve months after the date of any such forfeiture either have commenced to construct a Railway upon such forfeited line of Railway, or have granted the right of way to some person or association, the rights and privileges herein granted to this Company shall reinvest, and shall be held by them the same as if no forfeiture had taken place, provided further, that when a notice has been served to construct a line of Street Railway no notice to construct another line of street Railway, shall be served until after the expiration of thirty days and should the Company certify an intention
886 to comply therewith, no notice to construct another line of Railway shall be served more than thirty days before the time in which the first line of Railway is required to be completed, as hereinbefore provided.

SECTION 16. It shall be the duty of the City Clerk, immediately after the passage of a resolution requiring a particular line of Street Railway to be constructed as Provided in the fifteenth section of this Ordinance to prepare duplicate copies of such resolution, and serve one of them as heretofore provided and endorse his return upon the other, showing upon whom the same was served, and the date thereof, and report the same to the Common Council.

SECTION 17. If at the expiration of ten years after the passage of this Ordinance, or any period of time thereafter, said Company shall not have laid ten miles of track or more, of uniform gauge, and composed of the most approved rail, and have furnished the same with the necessary Cars of the best style and a sufficient operative force and have continued to maintain the same in operation according to the intent of this Ordinance, then the Common Council may at their discretion, order a just and fair appraisement of all tracks, cars, animals and appurtenances belonging to said Company, and purchase the same, and pay said Company the amount of said appraised value therefor, or transfer the same to any person or corporation who will pay the same amount or said appraised value to said Company, and when said purchase or transfer has been made by the Common Council the rights and privileges granted to said Company by virtue of this Ordinance, shall revert back to the City of Indianapolis.

SECTION 18. The appraisement contemplated by the next preceding section, shall be made by two freeholders, one to be appointed by the Common Council and the other by said Street Railway Company, and in case of their disagreement, they may select a third one; any two of the three may make the appraisement.

SECTION 19. That an ordinance passed on the eleventh day of December, eighteen hundred and sixty three, entitled an Ordinance authorizing the construction, extension, and operation of certain Passenger Railways in and upon the streets of the city of Indianapolis and all other ordinances conflicting with the provisions
887 of this Ordinance, are hereby repealed.

SECTION 20. This Ordinance shall be in force, from and

after its passage, and publication for two consecutive weeks in the Weekly Indiana State Journal.

J. GAVEN, *Mayor.*

Ordained and established this 18th day of January, A. D. 1864.

Attest:

CYRUS S. BUTTERFIELD,
City Clerk.

* * * * * * *

(Endorsed:) Filed September 15, 1906. E. R. Mason, Clerk.

888 EXHIBIT No. 13. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the Matter of the Des Moines Street Railway Company. Revised Ordinances of 1879, Chapter Forty-six.

I am asked the question, what in my judgment is the duration of the franchise thereby granted.

I. If the question depended upon the granting clause of the ordinance, section one, there would be no question that the grant would be perpetual, as of an estate conveyed to a corporation whose duration is limited by its charter to a term, may be in fee.

Nicholl *v.* N. Y. & E. R. Co., 12 Barb., 465.

The duration of a corporation is perpetual unless limited by the terms of its charter, and as corporations for profit, under our statutes, may *of right* be renewed from time to time without limit, they are in effect perpetual.

II. The question depends,—indeed, could not otherwise be made,—upon these two clauses of the ordinances:

(1) Authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner *and for the time*, and upon the conditions hereafter mentioned and described. (Section 1.)

(2) The right hereby granted to said company to operate said railway shall be *exclusive* FOR THE TERM OF THIRTY YEARS FROM THE TIME the first mile of said track is laid and cars running thereon. (Sec. 10.)

By section nine, the company was required to have at least one mile of its railway completed by the first day of January, 1869, so that the privilege named in section ten may be said to expire at the end of thirty years from that date; but as, by a familiar rule of construction, alike applicable to city ordinances and public statutes, every grant is to be so construed that every word will have some effect, it is clear that this rule would be violated if the entire privilege was to end at that day. A *right* and an *exclusive* right, are

so essentially different in character and value, that it cannot be presumed that the one necessarily carries the other with it.

889 No one would think of contending that the grant made by the first section would be exclusive unless so provided. The exclusive right was by way of *inducement, consideration* for the general grant; it was something in addition to it; it was what the city *gave* for what the company *was to do*, under its acceptance of the general grant. This view was strengthened by the language of section nine, which speaks of what follows as *qualifications* of the right conferred; the word *exclusive* may very well *qualify* the thing to which it relates, without destroying it. In my judgment, the former is its proper office: to qualify is not to destroy, and certainly in a case involving a large expenditure of money mainly in expectation of *future* enjoyment, of future profit, it should not be given that meaning, except upon the most cogent grounds; and where the intention of the parties to exclude every other meaning was at least reasonably manifest. So far from that being the case with this ordinance as to private rights,—another name for *contract*, it is a *strained* meaning, one which there is no reason to believe that either of the parties had in view when the contract was made, and which, if hereafter enforced, would be to deprive him of the principal consideration for making it. No court would do that, unless the language used, to a high degree of certainty, excluded every other construction.

It seems to me there can be but one conclusion, the exclusive right expires at the end of thirty years, while the general right is without limitation of time.

(Sgd.) GALUSHA PARSONS.

I drew the ordinance in question and know that the intention was to give the Street Railway Company a perpetual right in the streets which should be exclusive for thirty years. I therefore concur in the conclusions reached by Mr. Parsons above.

(Sgd.) J. S. POLK.

890 EXHIBIT No. 11. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 85.

An Ordinance to Amend Section 9 of Ordinance No. 28, Passed December 10, 1865.

SECTION 1. Be it ordained by the City Council of the City of Des Moines:

That section nine of an ordinance passed December 10, 1863, entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des

Moines" be and the same is hereby repealed, and there is enacted in lieu thereof the following, to-wit:

SECTION 9. This charter is granted, and the rights and privileges herein conferred, are subject to the following conditions, to-wit: That the said company shall have at least one mile of said railway fully completed and equipped and cars running upon the same by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped and cars running thereon by the first day of January, A. D. 1872, and one additional mile fully completed and equipped, and cars running thereon by the first day of January, A. D. 1874, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited and revert to the City of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section, for the completion of such given number of miles of said railway; provided, that in case any such injunction, or order of court, or any judge is procured upon the application of any party other than the city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order, and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order and to obtain a dissolution of the same, or to assist the attorney of said company. Said Com-
891 pany shall pay all expenses that may accrue by reason of such suit or suits, and unless such notice is given, the time of the continuance of such order or injunction shall not be given to said company.

SECTION 2. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company in the construction of their railway upon any and all bridges, upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges, as nearly as practicable.

SECTION 3. The ordinance to be in force after publication in the Daily Iowa State Register.

J. H. HATCH, *Mayor.*

The foregoing ordinance was passed Sept. 5, 1870, and published in the Daily Iowa State Register, September 9th, 1870.

J. W. CATTELL,
City Clerk.

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892 (Endorsed:) Fil- Sep. 15, 1906. E. R. Mason, Clerk.

893 EXHIBIT No. 15. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book D, Page 321, October 2d, 1870.

A written acceptance by the Des Moines Street Railway Company of the condition of the ordinance extending the time for building track of their road was presented and placed on file.

* * * * * * *

(Endorsed:) Filed September 15, 1906. E. R. Mason, Clerk.

894 EXHIBIT No. 16. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 131.

An Ordinance to Repeal Section One of Ordinance No. 85, Entitled "An Ordinance to Amend Section 9 of Ordinance No. 28, Passed December 10, 1866.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That section 1 of ordinance No. 85 of City Ordinance be and the same is hereby repealed and there is enacted in lieu thereof the following, to-wit:

SECTION 9. This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped and cars running thereon by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped and cars running thereon by the first day of January, A. D. 1872, unless the City Council of said city shall grant to said company a further extension of time and on the failure of said company to construct the number of miles of said railway within the time herein specified all rights and privileges herein granted shall be forfeited and revert to the City of Des Moines, Provided: that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company, over and above the time given by this section for the completion of such given number of miles of said railway. Provided, that in case any such injunction or order of court or any judge is procured upon the application of any party other than the City of Des Moines said company shall immediately notify the Mayor and City

Solicitor of such injunction or order and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order and to obtain a dissolution of the same or to assist the attorney of
895 said company. Said company shall pay all expenses that may accrue by reason of such suit or suits and unless such notices — the time of the continuance of such order or injunction shall not be given to said Company.

SECTION 2. The foregoing extension of time for the construction of said railway is granted upon the express conditions that said company in the construction of their railway upon all bridges upon which the same may run shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

SECTION 3. This ordinance to be in force on and after publication as required by law.

Compared and signed Feb. 9. 1872.

MARTIN TUTTLE, *Mayor.*

I certify that the foregoing ordinance was passed by the City Council Feb. 5, 1872, and published a first time in the Daily Iowa State Register, Feb. 8, 1872.

TAYLOR PIERCE,
City Clerk.

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(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

896 EXHIBIT No. 17. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An Ordinance to Authorize the Des Moines Street Railway Co. to Use Steam, Horse, or Other Animal Power (Such as is Used on Street Railways and Acceptable in Other Cities) in the Operation of Their Street Railroads.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: that section two of Ordinance No. 31 of the Revised Ordinances of 1874 is hereby repealed.

SECTION 2. In lieu thereof there is ordained as follows: the cars to be used on the tracks of the said Des Moines Street Railway Co. shall be operated with steam power, such as is used on street railways and acceptable in other cities or animal power, and no car or carriage used on the tracks of any other company shall be used upon the tracks of said railway.

SECTION 3. This ordinance shall take effect by publication as provided by law.

GILES H. TURNER, *Mayor.*

C. S. WILSON,
Clerk pro Tem.

(The foregoing is found in the Iowa State Register, under date of Sunday, September 30, 1877, said paper being No. 244.)

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(Endorsed:) Filed Sep. 15, 1903. E. R. Mason, Clerk.

897 EXHIBIT No. 18. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book I, Page 28, August 1, 1881.

Ald. Williams offered the following which on motion of Ald. Brady was adopted:

"Resolved that the Street Railway Company is hereby directed to make such repairs on street railway as may be required to place the same in good condition for public travel."

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(Endorsed:) Filed Sep. 15, 1903. E. R. Mason, Clerk.

898 EXHIBIT No. 19. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and Along the Streets of North Des Moines.

SECTION 1. Be it ordained by the town Council of the Town of North Des Moines, that consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches, in, along and upon all streets, and such alleys only fronting on which said company has depots, stables, or car-houses, and over the bridges and on such streets in the town of North Des Moines, with their present and future connections and extensions, and authority is hereby given to said company, their successors or assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereafter mentioned and prescribed.

SECTION 2. The cars to be used on the tracks of the said Des Moines Street Railway Company shall be operated with steam power, such as used on street railways, and acceptable in other cities, or ani-

nal power, and no cars or carriages used on the tracks of any other company shall be used on the tracks of said street railway.

SECTION 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities, provided said company shall, at all times, have the right to use their track for transporting iron, ties or other material for constructing their road and keeping the same in repair and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the town of North Des Moines and said company.

899 SECTION 4. The tracks of said railway shall be laid so as to conform to the established grade of the streets on which the road may be built wherever the town has, or may have, established such grades. Where streets are not graded, said company, may if they desire, lay their tracks so as to conform to the surface of such streets, provided that they raise the same to grade whenever the town shall grade the same or any part thereof, and in case said town of North Des Moines pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve the space between the rails or track, so that it shall substantially correspond with the improvements of the street outside the track, provided said company shall plank the space between the tracks at each principal street crossing wherever required by the street committee.

SECTION 5. The said town of North Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying water or gas pipes, or the necessary repair of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

SECTION 6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make the center points between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon such alley as provided for in section one, a single track only shall be laid, and no side-tracks, switches or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks along and upon streets shall be allowed on any such alley, provided, however, that if said company shall have its depot, station,

900 stable or car-houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car-houses.

SECTION 7. The cars on any and every line or route of said railway in the town of North Des Moines shall connect with a line or

route extending at least to Walnut Street in the City of Des Moines, Iowa, and the rate of fare between the extreme terminus of any one route whenever such terminus shall hereafter be fixed in the city of Des Moines, and the town of North Des Moines, respectively, shall not exceed five cents and no discrimination shall ever be made against any points in North Des Moines and in favor of any point on the city of Des Moines, Iowa, On the same route.

SECTION 8. The cars of said company shall be entitled to the tracks, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said town of North Des Moines, such team or vehicle shall give way to such car, nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said railway cars by placing, driving, stopping, or — to be placed or driven in a slow pace or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway or either of them, after being notified by the driver or conductor, by the ringing of the car bell, or otherwise. And whosever shall wilfully violate any of the provisions of this section shall upon conviction thereof before any magistrate of said town of North Des Moines be fined not less than five nor more than fifty dollars.

SECTION 9. This charter is granted, and the rights and privileges herein conferred, are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one-half mile of said railway as an extension of its present line on Ninth street in the city of Des Moines, directly north on said Ninth street to the north corporation line of the town of North Des Moines fully completed and equipped, and cars running thereon by the 1st day of August, 1885, provided, however, if said company is delayed in the construction of said railway, by order or injunction of any
961 court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of each half-mile of said railway. The foregoing extension of time for construction of said railway is granted upon the express condition that said company, in the construction of its rail way upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

SECTION 10. The right herein granted to said company shall not operate to hinder the town of North Des Moines from chartering any other company for a like public service; and any company so chartered shall have equal rights to any street that may have been occupied by the Des Moines Street Railway Company for the distance of not to exceed seven hundred feet, provided that whenever any street shall be so used by more than one company, the company which shall be the last so to occupy the street shall pay all the cost of so adjusting the tracks already laid as to give both companies said equal privileges.

SECTION 11. Said company shall annually on or before the first day of February of each year, after the year 1896, furnish to the treasurer a statement of the net receipts of the company for the

year ending on the first day of January next preceding, which said statement shall be subscribed and sworn to by the secretary and treasurer of the company, and there shall be levied on such proportion of such net receipts as the whole number of miles of railway owned and operated by said company in North Des Moines shall bear to the whole number of miles owned and operated by said company a tax of three per cent. for municipal purposes, which tax at the same time shall be collected in the same manner as other taxes; and such tax, from the time of such levy, shall be a lien upon the property and franchise of said company, in the same manner and to the same extent that other taxes levied by the town of North Des Moines are liens. If such sworn statement as above required is not made
902 and filed with the treasurer within the time above prescribed, the treasurer shall ascertain as nearly as may be such net receipts, and municipal tax shall be levied thereupon as above provided; and the tax herein above provided shall be in lieu of all taxes and assessments for all municipal purposes upon the property of said company; and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof in the same shall not be taxed in any other manner for any municipal purpose. But prior to the year 1896 no taxes whatever for municipal purposes shall be levied upon the property of said company, or the right, property or interest of any person in the same. And in case any such tax for Municipal purposes is so levied, the town of North Des Moines agrees and undertakes to pay the same.

SECTION 12. The cars or carriages of the company shall be run upon and along the track of said railroad in conformity with the following rules and regulations, to-wit:

I. No car shall be run at a greater rate of speed than six miles per hour.

II. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

III. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity, or accident, or where cars are near stations.

IV. No cars shall be left to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

V. No car shall be allowed to stop on a cross walk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street; or to take on or leave off passengers.

VI. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the cars shall be stopped when by so doing the injury may be averted.

903 VII. All proper care shall be made by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

VIII. The conductors and drivers shall use proper diligence to prevent children under twelve years of age or ladies from leaving or entering the car while in motion.

IX. Conductors or drivers shall announce to passengers in a distinct tone the names of all streets crossed, as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company.

X. The cars after sunset shall be provided with signal lights.

XI. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the line and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

XII. Within thirty days from the publication of this ordinance said company shall file with the recorder of said town a written acceptance of the grants herein made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted this ordinance shall operate as a contract between the town and said company; and upon failure to file such acceptance, as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

O. P. May 9, 1885.

STATE OF IOWA, *Polk County, ss:*

I, W. B. Tomkins, recorder of the town of North Des Moines, Polk County, Iowa, hereby certify that the Des Moines Street Railway Company filed their acceptance of the ordinance of said town passed May 9, 1885, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of North Des Moines, Iowa," in the office of the
904 recorder of said town on the 1st day of June, 1885, as provided for in section 13 of said ordinance.

Witness my hand this 2d day of September, 1889.

W. B. TOMPKINS, Recorder.

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(Endorsed:) Filed September 15, 1906. E. R. Mason, Clerk.

905 EXHIBIT No. 20. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book L, Page 223, June 22, 1885.

Alderman Chaffee offered the following which on motion of Alderman King was adopted.

"Resolved, That the Des Moines Street Railway Company be instructed to put the street car track in the center of the street between

Fourteenth and Sixteenth streets on Woodland Avenue, the same to be done at the time of grading the street. The street car track shall conform in grade to the street after being put to practical grade in accordance with a resolution adopted June 22, 1885.

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(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

906 EXHIBIT No. 21. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book L, Page 490, January 18, 1886.

An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railroad in the City of Des Moines, and defining the powers and duties of said Company—was read a first time and referred to Committee on Judiciary.

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(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

907 EXHIBIT No. 22. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book L, Page 531, March 22, 1886.

Ald. Drady offered the following:

"Resolved, that the Des Moines Street Railway Company be compelled to drive their horses inside of their tracks and that the City Solicitor be instructed to see that the provisions of this resolution are carried out." Ref. to Judiciary.

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(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

908 EXHIBIT No. 23. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book L, Page 575, April 27, 1886.

Resolved that the Solicitor be directed to report to this Council if in his judgement the horses used on the street car line be compelled

to travel inside the rails of said track, that is to say, can the proprietor of said line be compelled so to use his horses. On motion of Ald. Drady the resolution was adopted. Resolution approved by the Mayor.

* * * * * * *

(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

909 EXHIBIT No. 24. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book L, Page 576, April 27, 1886.

"An ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct and operate street railways in the City of Des Moines and defining the powers and duties of said Company," being the special order was taken up, considered, amended, and laid over for further consideration till next meeting.

The Judiciary Committee & City Solicitor made the following report, viz: "We the Judiciary Committee, and City Solicitor to whom was referred by the City Council the following interrogatives:

1st. "Whether the City in the ordinance granting to the Des Moines Street Railway Co. the right to construct and operate a railway in Des Moines exceeded its power under the law.

2d. "Whether there exists good cause for the forfeiture of the franchise, and the repeal of said ordinance" and also to whom was referred the petition of many citizens asking the City Council to investigate and ascertain the legal rights of the City on the one hand, and the street railway company on the other: the said petitioners understanding that the Des Moines Street Railway Co. claims:

1st. That it has the absolute right to lay tracks and run cars upon any street in the city"

2d. "That it has the exclusive right to operate a street railway in Des Moines.

3d. "That it is in no wise subject to the supervision of the City in respect to the manner in which the railway is constructed or the character of the service it gives the public."

4th. "That the method of taxation prescribed in the ordinance, whereby it substantially escapes its just share of the public burdens is valid."

Would report that we have given the matter careful consideration, and have given full and patient hearing to the citizens' executive committee by their council, and also the Des Moines Street Rail Road Co. by its counsel. We will give our conclusions upon
910 each proposition in the order presented. As to the 1st question submitted by the Council we say: That in so far as the City by ordinance attempted to give said street railway the exclusive right to construct and operate a railway in Des Moines, it exceeded

its power under the law; and also, as in so far as it provided for the payment of a per cent. of its net earnings in lieu of all city taxes. As to the 2d question we say; that in our judgement no good cause now exists for the forfeiture of the franchise, and repeal of said ordinance. If good cause or causes have heretofore existed they have been waived by former councils.

As to the 1st claim made by said Des Moines Street Railway Co. as understood by the citizens, we say that said company has not the absolute right to lay tracks upon any street in the City. The City must preserve and secure to the public a reasonable use of its streets, and it cannot divest itself of the power to do this, and though no words of limitations are contained in said ordinance, yet the grant is subject to the power of the City Council to prohibit the laying of tracks on streets where the laying of tracks will deprive the public of a reasonable use of said such streets.

As to the 3d claim we say: That it is not well founded; that said company is subject to the supervision of the City with respect to the manner in which the railway is constructed, and the character of the service it gives the public. All street railways are a burden and obstruction to streets, and the City in the exercise of its police power, a power of which it cannot divest itself, must see and require that the road be so constructed as to be as light a burden and little obstruction as can be reasonable. We do not understand that the manner of construction includes the kind of road or gauge. The ordinance having fixed no gauge, and the railway, having adopted a narrow gauge and the City having acquiesced for many years, it is now beyond the power of the City to require the said railway company to convert its road into a broad gauge road. If we should concede that the City has that power, yet the city cannot in the opinion of your committee order the change. To have the
911 power is one thing, to exercise it is quite another. The City cannot exercise arbitrarily the power it possesses: It can only exercise them in a reasonable manner. To require the change would be to almost confiscate the property of the said company. Clearly nothing less than absolute necessity would justify the exercise of the power, when such disaster would follow. In the opinion of your committee no such necessity exists.

The right to use the streets for a railway is a valuable franchise, and the consideration for is is a promise, implied if not expressed, to give the public reasonable service. What is reasonable service may be difficult to define. Clearly it would not be reasonable to run cars only one day in the week, or only on such days as the City would be filled with strangers, or to run only during the most busy part of the day. Your committee are of the opinion that in order to secure service the City may regulate the time of starting cars in the morning, the hour to which they shall run at night, the intervals of time between cars, and make other reasonable regulations to secure that end.

As to the 4th claim as we have said above if it was intended that said railway company should pay certain of its net earnings in lieu of all city taxes then the city exceeded its power and that part of

the ordinance is void. The City has no right to exempt any property from bearing its just proportion of taxation. It is urged that said per cent. of net earnings is paid in lieu of the ten mill levy for general fund only, and is therefore legal. Whether it would be legal if limited to the ten mill levy, we need not discuss as we are clearly of the opinion that by the terms of the ordinance the payment of said per cent. of net earnings is in lieu of all city taxes.

At the request of the executive committee of citizens we submit an ordinance prepared by them. We see much in said ordi-ance to admire and approve, it is perhaps premature for us to express an opinion as to what would be the effect if said ordinance should be adopted, and the said company should refuse to accept it.

Respectfully submitted.

(Sgd.) W. F. CONRAD,
(Sgd.) J. C. MACY,
(Sgd.) L. BOLTON,
For Jud. Com.

J. H. DIETRICK,
City Solicitor.

On motion placed on file.

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912 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

913 EXHIBIT No. 25. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Page 35, Book M, June 29th, 1886.

"An Ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate Street railroads in the City of Des Moines and defining the powers and duties of said Company."

Ald. Drady moved to adopt. Roll Call. Ald. Macy moved to amend the amendment by striking out from 6th to the River, on Locust St., Ald. King moved as a substitute for all pending motions that the bill lay over till Monday, July 5th, and that the same be printed, and that the bill be made a special order at 2 P. M. Roll Call 4 Yeas Chaffee, King & Macy (3) Nays Bolton, Conrad, Drady, Egan & Weitz (5) Absent Morris (1).

Ald. Macy moved to amend by striking out Locust from 6th to the River—Roll Call—5 Yeas, None. Nays, Bolton, Chaffee, Conrad, Drady, Egan, Macy & Weitz (7) Absent Morris. Ald. King was excused from further attendance at this session: Ald. Bolton moved as a substitute for all pending motions that the ordinance be read a 3d time. Ald. Macy moved to lay the motion to read a 3d time on

the table. Roll Call—Yeas King & Macy (2) Nays—Bolton, Chaffee, Conrad, Drady, Egan, & Weitz (6) Absent Morris (1) The motion recurring on Reading a 3d time, Roll Call, Yeas, Bolton, Chaffee, Conrad, Drady, Egan, King, Macy & Weitz (8) Absent Morris (1) Ald. King moved to strike out Sec. 17-60 and insert 30 —adopted—Ald. King moved to adopt Sec. 10. Roll Call, Yeas, Chaffee, Conrad, Egan, King & Macy—5—Nays, Bolton, Drady & Weitz (3) Absent Morris (1).

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914 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

915 EXHIBIT No. 26. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate Street Railways in the City of Des Moines and defining the powers and duties of said Company.

O 354. P. June 29, 1886.

SECTION 1. Consent, permission and authority is hereby given and granted to and vested in the Des Moines Broad Guage Street Railway Company, and its successors and assigns, to construct, equip, maintain, and operate, for the term of twenty-five years, upon the conditions hereinafter stated, a single or double standard or broad guage street railway track, to be four feet, eight and one-half inches wide, along and over the streets, alleys and bridges of and within the city of Des Moines, hereinafter designated, and such other streets and alleys of said city as said company may hereafter select with the consent and approval of said city, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks and switches, along the streets and such alleys only fronting on which said company shall have depots, stables or car houses, and in constructing and operating said railway and said company shall have the right to intersect and cross the track or tracks of any street or other railway.

SECTION 2. The streets specifically referred to in section one hereof are the following:

Court avenue; Locust street, from West Fourth to East Fifth street; East Seventh from Court avenue to Locust; Locust street from East Seventh to East Ninth; East Ninth street from Locust to Des Moines street; East Fifth street from Locust to Des Moines street; East Thirteenth from Court avenue north to city limits; West Second street from Locust street north to Crocker; Crocker street from Second to Fourth street; West Fourth from Crocker to

School street; School street from Fourth to Sixth; West
916 Sixth street from School to north corporation line. Provided, this grant shall not be held to authorize the laying of more than one track and the necessary turn-outs and switches, along any street upon and along which there shall be at the time of laying such single track another line of parallel street railroad constructed and in actual operation, under and in accordance with the ordinances of said city.

SEC. 3. The cars to be used upon such tracks shall be of the best style and class in other first-class cities of this country, and shall be operated by animal power only. The tracks shall not connect with any railway on which any other power is used, and no railway car or carriage used upon any railway operated by other than animal power shall be used upon any of said tracks; and said tracks and cars shall be used for the purpose of transporting passengers and their ordinary baggage only. Provided, said company shall at all times have the right to use said track for transporting materials to be used by it in constructing, repairing and operating said road.

SEC. 4. In the construction of said tracks a tram rail only shall be used, the width of which shall be five inches from outside to outside, the width of the tram shall be three inches horizontal; the height along the wagon edge, or from the rim to the highest part of the rail, shall not be more than seven-eight-s of an inch.

SEC. 5. The track shall be laid so as to conform to the established grade of any street on which the road may be built, whenever the city has or hereafter shall establish such grade. When the streets are not graded, said company may lay its tracks so as to conform to the surface of such streets, but the same shall be made to conform to the grade whenever the city shall grade such streets or any part thereof; and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run, said company shall at its own expense pave or otherwise improve the space between the rails of their track so that it shall
917 substantially correspond with the improvement of the street outside of the rails and track. Where said tracks are laid upon a street already paved the company shall pay the property owners abutting for the paving within the rails. Payment to be made before cars are operated. And said company shall plank the space between the track at each principal crossing, whenever required by the Mayor or City Council, and to their satisfaction. And they shall restore all streets whether paved or not, to as good condition as before the laying down of their tracks.

SEC. 6. The said city of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement of repair of any street.

SEC. 7. Upon all streets and alleys where said company is granted permission to lay its tracks, along which no other parallel railroad track is laid, the tracks of said company shall be laid in the center

of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in such case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and there shall be no greater space between the tracks than reasonably necessary for to pass, and said tracks shall not be laid within twelve feet of the curb line, unless permission first be obtained of the City Council, upon any street in case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alleys, as provided for in section one, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except in cases where turn-outs are used to connect tracks laid along
918 and upon streets, shall be allowed on any such alleys; provided, however, that if said company shall have its depots, stations, stables or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car houses.

SEC. 8. In all cases where said company shall desire to construct a line of street railway parallel to the line of any other street railway previously laid, and being used on said street or streets, said company may lay its tracks as near the center of said street as practicable, without interfering with the practical operation of the line of railroad then in operation along such street.

SEC. 9. The rate of fare shall not exceed five cents for each passenger on any one route of the company, from the extreme north end to the extreme south end of said track, and from the extreme east end to the extreme west end of said track.

SEC. 10. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the said street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle, or other obstacle in, upon, across, along, or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the bell or otherwise, and whoever shall willfully violate any of the provisions of this section shall, upon conviction thereof before the Police Judge of said city, be fined in any sum not less than five nor more than fifty dollars.

SEC. 11. This charter is granted upon, and the rights and privileges herein conferred subject to, the following conditions, to-wit:

SEC. 12. In the construction of their railway upon all
919 bridges, upon which the same may run, the company shall so construct the same that the top surface of the rails of said railway shall be on a level with the surface of the floor of the bridges, and on all paved streets the top surface of the rails shall be on a level with the surface of the pavement.

SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations to-wit:

First. No car shall be run at a greater rate of speed than six miles an hour.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near at stations.

Fourth. No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street or to take on or to leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one on or near the track, the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

920 Ninth. Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of other railway companies, at which excepted stations they may stand a longer time.

Twelfth. Cars shall start from both ends of any line as early as six o'clock a. m. and run continually as late as twelve o'clock midnight, from six to nine o'clock a. m. and from nine o'clock P. M. to midnight cars shall run at intervals of not more than ten minutes, and from nine o'clock a. m. until nine o'clock P. M. cars shall run at intervals of not more than five minutes.

SEC. 14. Whenever the City Council shall by ordinance grant to any other street railway company the right to lay its track along and upon any street, upon which company shall have laid its track or tracks, and shall then be operating its line, the City Council may by resolution require the said Des Moines Broad Guage Railway and its successors, at expense of some other street railway company, to move its track (if but one) to one side of the center of the street, so that the new track may be so laid that the center of the street shall be the center of the space between the said tracks; if said company shall have two tracks on such street, then they shall be so moved as to permit the laying of the new tracks in such position that the space between the sidewalks and the track on each side of the street

shall be equal. Should the said company fail or refuse to move its track or tracks, as above provided, when notified so to do by
921 resolution of the City Council, the City Council may cause the said track or tracks to be moved at the expense of said company.

SEC. 15. Whenever another street railway company, duly authorized by the City Council shall desire to operate its line, for a distance of not more than two blocks, along and upon any street upon which the said Des Moines Broad Guage Street Railway shall have laid its track, and shall then be operating its line, the City Council may require such new company to run its cars upon and along the said track or tracks for said distance, and said Des Moines Broad Guage Railway Company shall grant such other company the right to use its track or tracks for said distance upon the payment by such other company of a reasonable compensation, to be agreed upon by said companies, if possible, but if the companies cannot agree, then the compensation shall be fixed by three persons, one to be chosen by each company, and the two so chosen to choose the third. Provided, such other company shall not use such track so as to interfere with or unnecessarily obstruct the operation of the cars of the company owning such line according to their schedule time of running their cars thereon.

SEC. 16. A failure to use any track or tracks and run cars thereon on any street or part of street, as provided by rule twelve, section thirteen of this ordinance, for a period of thirty days, unless unavoidably prevented, shall be deemed an abandonment of such street or part of street by said company, and the City Council may be resolution declare such street or part of street abandoned, and require the said company to remove its track or tracks from such street or part of street, and upon the failure or refusal of said company to remove such track or tracks, when notified to do so, the City Council may cause the same to be removed at the expense of the said Company.

SEC. 17. The said company shall commence work on its line within sixty days from the passage of this ordinance, and shall have two and one-half miles of track completed and cars running thereon, as provided by rule twelve, section thirteen, within
922 one year from such date, and within two years from such date shall have five miles of track completed and cars running thereon.

SEC. 18. The City Council reserves the right to adopt from time to time, and compel compliance therewith, other reasonable rules and regulations.

SEC. 19. In any litigation arising out of the grant herein given, the city shall not be liable for any costs or damages growing out of such litigation.

SEC. 20. After the expiration of ten years from the passage of this ordinance, the said company shall pay annually to the city five per cent. of its net earnings as consideration for the rights and privileges herein granted, but nothing herein shall be construed as

exempting said Broad Guage Street Railway from taxation the same as other property subject to taxation.

SEC. 21. The rights and privileges herein granted are upon the express condition that the Des Moines Broad Guage Street Railway Company shall first file with the City Clerk a bond in the sum of ten thousand dollars for the faithful compliance with the terms and conditions of this ordinance, to be approved by the City Council.

SEC. 22. Within thirty days after the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grant hereinabove made, with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company; and upon failure to file such acceptance, as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchise whatsoever.

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923 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

924 EXHIBIT No. 27. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 53, July 6, 1886.

The Des Moines Broad Guage Street Railway presented the following acceptance of railway franchise passed June 29, 1886:

To the Honorable City Council of the City of Des Moines:

Now on this 6th day of July A. D. 1886. The Des-Moines Broad Guage Street Railway Company accepts the ordinance passed by the said City Council June 29, 1886, entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railroads in the City of Des Moines and defining the powers and duties of said Company." And said Company accepts the grant made by said ordinance, with the conditions regulations and limitations therein expressed. And said company herewith files and presents its Bond in the sum of ten thousand dollars conditioned as prescribed by said ordinance, and it asks that the same be approved by the Council.

In witness whereof the President and Secretary of said company have hereunto signed their names this 6th day of July A. D. 1886.

(Sgd.) THE DES MOINES BROAD GUAGE STREET RAILWAY
By G. VAN GINKEL, *President*.
H. E. TEACHOUT, *Secretary*.

On motion the foregoing acceptance was accepted by the Council and placed on file.

The Bond of the Des Moines Broad Guage Street Railway Com-

pany as principal and G. Van Ginkel, John Weber & H. E. Teachout as sureties in the sum of ten thousand dollars as provided by ordinance in relation to said street railway was presented for approval.

On motion of Ald. Macy the Bond be approved subject to the usual legal qualification of sureties on Bonds. Said qualifications to be furnished by said company. Mr. Bayles att'y for said railway agreed & promised to furnish said qualifications for said Bond. Carried.

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925 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

926 EXHIBIT No. 28. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents, That The Des Moines Street Railway Company of Polk County, and State of Iowa in consideration of the sum of One Dollar and Other valuable considerations in hand paid by the Des Moines Street Railroad Company of Polk County, and State of Iowa does hereby Sell and Convey unto the said Des Moines Street Railroad Company the following described premises, situated in the County of Polk and State of Iowa, to-wit:

Lot one (1) of Mariah Grimmels subdivision of Lot Nine (9) of Block G. of Grimmels Addition to the town of Fort Des Moines; also the South one third (1/3) of Lot Four (4) in Block N. of said Grimmels Addition to the town of Fort Des Moines; also Lot Four (4) in Block One (1) of Youngs Addition to the City of Des Moines, Iowa. All of said property above described being included in the City of Des Moines, Polk County, Iowa.

And the said Des Moines Street Railway Company hereby covenants with the said Des Moines Street Railroad Company that it holds said premises by good and perfect title; that it has good right and lawful authority to sell and convey the same, that they are free and clear of all liens and incumbrances whatsoever, except the mortgage to secure the $25,000.00 of bonds the payment of which is assumed by the Des Moines Street Railroad Co.

And it covenants to warrant and defend the said premises against the lawful claims of all persons whomsoever except said $25,000.00 mortgage.

Signed this 1st day of July, A. D., 1886.

DES MOINES STREET RAILWAY COMPANY.
By M. P. TURNER, *President.*
By M. A. TURNER, *Secretary.*

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927 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

928 EXHIBIT No. 29. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all Men by these Presents: That for and in consideration of the sum of two hundred and four thousand Dollars ($204,000.00) and the agreement to pay the Twenty five Thousand Dollars ($25,000.00) of bonds hereinafter referred to the undersigned, the Des Moines Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, does hereby grant, bargain, sell, convey and transfer unto the Des Moines Street Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, the following described property, to-wit:—

All and singular the street railway lines now constructed and owned by the grantor herein in the City of Des Moines and in the Incorporated Town of North Des Moines, together with all the real estate, lands, tracks, rails, privileges, easements, rights of way, leases, terms and parts of terms, agreements covenants, contracts of all and every kind, franchises and personal property, choses in action, leasehold, and other things of and belonging to said party of the first part of every kind and character whatsoever, in the City of Des Moines, and in the Incorporated Town of North Des Moines, and all houses, barns, buildings, and the lands on which they stand, with all the appurtenances necessary or convenient for the sole, complete and entire use and operation as well as maintenance of said street railway and its extensions owned or leased by the said grantor; also all materials, tools, machinery, carts, wagons, cars, horses, harness, and all other movable property now owned or belonging or appertaining to said Des Moines Street Railway Company and connected with the proper equipment, operation and conduct of the same, all of which personal chattels are hereby declared and agreed to be fixtures and appurtenances of said street railway; and also all and every other interest, property or thing which the said grantor has, owns or holds; also all rights and privileges to use the said street railway extensions and other property personal and
929 real constructed at the execution of these presents, as fully and effectually as the said Des Moines Railway Company, is or may be by law entitled to have or to acquire or use the same, including all and singular the rights, privileges and franchises heretofore conferred upon the Des Moines Street Railway Company by the City of Des Moines by virtue of Ordinance No. 63, passed December 10, 1866, by the City of Des Moines, and by various ordinances amendatory thereof and the acts of said Company in acceptance thereof, and also all rights and privileges conferred upon the grantor herein by virtue of a certain ordinance passed by the Incorporated Town of North Des Moines, Iowa; and the act of said Company accepting the same, and including all other property now

held or owned by the Company making this conveyance and transfer of every kind and nature, the intention of this instrument being to sell, convey and transfer unto the Des Moines Street Railroad Company all property, franchises, easements and appurtenances now held or owned by the grantor herein, to have and to hold unto the said the Des Moines Street Railroad Company or its assigns forever.

It is, however, expressly understood and agreed that the Des Moines Street Railroad Company by the acceptance of this instrument of transfer hereby undertakes to pay in addition to the consideration named in this instrument the sum of Twenty five Thousand Dollars ($25,000.00) with interest from this date, to the holders of the bonds heretofore issued by the Des Moines Street Railway Company, amounting to the sum of Twenty five Thousand Dollars ($25,000.00) and the said Des Moines Street Railroad Company, by the acceptance of these presents, undertakes and agrees to pay and cancel in full, on or before the first day of July, 1888, or within sixty days thereafter, the said entire issue of Twenty five Thousand Dollars, ($25,000.00) of bonds, with interest, making a total consideration to be paid by the grantee herein of Two Hundred and Four Thousand Dollars ($204,000.00) to the grantor herein, and in addition thereto the Twenty five Thousand
930 Dollars ($25,000.00) of bonds heretofore issued by the grantor herein, with interest from this date.

It is further understood that the Des Moines Street Railroad Company by the acceptance of these presents agrees to honor and take up without compensation all tickets issued for fares or travel over any of the lines of the said street railway, that are now outstanding, heretofore issued by the Des Moines Street Railway Company, Dated this 1st day of July, 1886.

In Witness whereof the party of the first part has caused this instrument to be signed by its president and secretary and the corporate seal of the Des Moines Street Railway Company to be affixed on the day and date before written.

DES MOINES STREET RAILWAY COMPANY.

[SEAL.] By M. P. TURNER, *President.*
MARY A. TURNER, *Secretary.*

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931 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

932 EXHIBIT No. 30. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

This Instrument, executed this 1st day of July, 1886, by the undersigned M. P. Turner and M. A. Turner, who are the sole owners of the One Hundred Thousand Dollars ($100,000.00) of the capital stock of the Des Moines Street Railway Company, a corporation or-

ganized and existing under and by virtue of the laws of the State of Iowa, witnesseth:

That the undersigned owners of the said stock hereby convey, transfer and assign unto the Des Moines Street Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, for a valuable consideration, to-wit, the price paid by the Des Moines Street Railroad Company to the Des Moines Street Railway Company for its property, the said One Hundred Thousand Dollars ($100,000.00) of the capital stock so held and owned by them in the said the Des Moines Street Railway Company, to have and to hold unto the Des Moines Street Railroad Company, or its assigns, forever.

It is, however, expressly understood and agreed in making this assignment and transfer of the said stock that all of the corporate property of the said Des Moines Street Railway Company has been sold, conveyed and transferred to the said Des Moines Street Railroad Company for the consideration of Two Hundred and four Thousand Dollars ($204,000.00) and the assumption of outstanding indebtedness amounting to Twenty five thousand Dollars ($25,000.00) and has been paid for by delivering to the said the Des Moines Street Railway Company of One Hundred and Four Thousand Dollars ($104,000.00) in cash, and One Hundred Thousand Dollars ($100,000.00) of bonds, and that the entire purchase price of the said property, to-wit, the One Hundred and four Thousand Dollars ($104,000.00) of cash and the One Hundred Thousand Dollars ($100,000.00) of bonds have been divided among the holders of the said stock prior to this transfer thereof, and that there passes by virtue of this transfer no right whatever on the part
933 of the transferees of this stock to share or participate in any way in the proceeds of the sale of the corporate property of the said the Des Moines Street Railway Company made as aforesaid to the Des Moines Street Railroad Company, or of any money in its treasury, if any.

Signed in duplicate and a copy of this contract is also indorsed upon the back of the certificates of Stock hereby transferred.

M. P. TURNER.
MARY A. TURNER.

(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clrk.

934 EXHIBIT No. 31. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 52, July 6, 1886.

Ald. Conrad offered the following resolution:
Resolved by the City Council of the City of Des Moines:
That the Des Moines Broad Guage Railway Company is author-

ized and permitted to build and operate a street Railroad on and along Des Moines Street in East Des Moines, the same to be built and operated in accordance with charter of said company. Adopted June 29, 1886, on motion of Ald. Conrad the resolution was adopted on Roll Call by the following vote—Yeas, Bolton, Chaffee, Conrad, Drady, Macy, Morris & Weitz—7—Nays none. Absent Egan & K g.

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935 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

936 EXHIBIT No. 32. J. R. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the Broad Guage Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines.

SECTION 1. Be it ordained by the town council of the town of North Des Moines, that consent, permission and authority is hereby given and granted to and *in*vested in the Des Moines Broad Guage Street Railway Company and its successors and assigns, to construct, equip, maintain and operate for the term of twenty-five years, upon the conditions hereinafter stated, a single standard four feet eight and one-half inches in width, street railway track along and over the streets, alleys and bridges of and within the town of North Des Moines, hereafter designated, and such other streets and alleys of said town as said company may select, with the consent and approval of said town, and to construct and use in connection therewith all necessary and convenient tracks for turn-outs, side tracks and switches along the streets and such alleys only fronting on which such company shall have depots, stables or car-houses, and in constructing and operating said railway, said company shall have the right to intersect or cross the track or tracks of any street or other railway.

SECTION 2. The streets specifically referred to in section one hereof are the following: Sixth Street from the south line to north line of said town.

SECTION 3. The cars to be used upon such tracks shall be of the best style and class used in other cities, and shall be operated by animal power, only, for ten years, and thereafter as the town council may direct. The tracks shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any railway operated by other than animal power shall be used upon any of said tracks during said ten years, and
937 said track and cars shall be used for the purpose of transporting passengers and their ordinary baggage, only, provided that said company shall, at all times have the right to use said tracks

for the purpose of transporting materials used by it in constructing, repairing and operating said road.

SECTION 4. In the construction of said tracks a tram railway only shall be used, the width of which shall not be less than four feet eight and one-half inches from outside to outside. The width of the tram shall not be less than two and one-half inches horizontal. The height along the wagon edge, or from the rim to the highest part of the rail, shall not be more than seven-eights of an inch.

SECTION 5. The tracks shall be laid so as to conform to the established grade of any street upon which the road may be built whenever the same has or shall be hereafter built, whenever the same has or shall be hereafter established. Where the streets are not graded the tracks may be so laid as to conform to the surface of the street, and in case the town shall at any time pave or otherwise improve the surface of any street along which said railway may run, said company at its own expense, shall pave or otherwise improve the space between its tracks so that it shall substantially correspond with the improvement outside its rails and track, and the top of the rail shall be level with the surface of the street or pavement, and said company shall plank the space between the tracks at each principal crossing whenever required so to do by the council, and to their satisfaction, and they shall restore all streets to as good condition as before the laying down of its tracks.

SECTION 6. The town of North Des Moines shall not be held liable for any damage that may be occasioned by the breaking of any gas or water pipes, or for delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvements or repair of any street or streets.

938 SECTION 7. The tracks of the company shall be laid in the center of the street in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which last case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street; and said tracks shall not be laid within twelve feet of the sidewalk where the same can practically be avoided, and where any line of railway is laid along and upon any alley, as provided for in section one, a single track, only, shall be laid, and no side-tracks, switches or turn-outs, except where turn-outs are used to connect tracks laid along alleys with tracks laid along streets, shall be allowed on any such alley, provided that if said company shall have its depots, stables or car-houses on any lot fronting on such alley, they shall have the privilege of laying turn-outs tracks from such alley into such depots, stables, stations, or car-houses.

SECTION 8. The rate of fare shall not exceed five cents on any one route from the extreme north end to the extreme south end of such line in or out of North Des Moines and the city of Des Moines, and a like fare from the extreme east end to the west end of said track in or out of North Des Moines and the City of Des Moines.

SECTION 9. The cars of the company shall be entitled to the track,

and in all cases where a team or vehicle shall meet or be overtaken upon the railway of said company, such team or vehicle shall give way to such cars. No person shall wilfully or maliciously obstruct hinder or interfere with any of said railway cars or property by placing driving or stopping, or causing to be placed, or driven on a slow pace, or stopped, any team, vehicle or substance in, upon, across, along or on the track of said railway after being notified by the driver or conductor, by the ringing of the car bell or otherwise, and whosoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof, be fined in any sum not less than five dollars or more than fifty dollars.

939 The cars or carriages of the company shall be run upon and along the tracks of said railway in accordance with the following rules and regulations:

1. No car shall run at a greater rate of speed than ten miles an hour for the first two years, and not less than four miles an hour including stops.

2. While cars are turning corners the animals attached thereto shall not be driven faster than a walk.

3. Cars moving in the same direction shall not approach each other nearer than two hundred feet, except in cases of unavoidable necessity, or accident, or when near stations.

4. Cars shall not be left standing on any street at any time unless a team is attached thereto, in charge of a man, and the same is waiting for passengers or any other proper purposes.

5. No car shall be allowed to stop upon a cross-walk or upon any intersecting street, except to prevent collision or to avoid danger or to take on or leave off passengers.

6. The conductors and drivers employed by said company must use all reasonable care and diligence to prevent injury to persons or annoyance to passengers, and on the appearance of danger to any one on or near the tracks the cars must be stopped, if by so doing the injury can be avoided.

7. Reasonable care shall be used by conductors and drivers to prevent injury to teams, wagons, carriages and other vehicles.

8. Conductors and drivers shall use all proper diligence to prevent ladies and children under twelve years of age, from entering or leaving the cars whil- in motion.

9. Conductors shall announce to passengers in a distinct tone of voice the names of all streets crossed as the cars approach such cross street, and the- shall observe the same rules when nearing the track of any railway company.

10. The cars after sunset shall be provided with signal lights.

940 & 941 11. Cars shall not remain standing at any of the stations more than ten minutes except at stations for watering horses and at each end of the lines, at which excepted stations they may stand a longer time.

12. Any snow or other matter removed from the track shall be removed from the street, or so disposed of as not to interfere with travel.

13. Cars shall be run over the track each way not farther apart than fifteen minutes and the first car shall start from the north and west limits not later than six o'clock A. M. and the last car shall not reach said north and west limits earlier then eleven o'clock P. M.

Rule 13 shall remain in force for the first ten years and shall be subject to amendment thereafter by the council.

14. Said cars shall be warmed during the cold weather if demanded by the council.

SECTION 11. In any litigation arising out of the grant herein given the town shall not be liable for any costs or damages growing out of such litigation.

SECTION 12. Unless said company shall be running cars as provided herein, within six months from the adoption of this ordinance, unless restrained by order of court or judge, in which event, the time during which said restraining order is in force is not to be computed, said council may declare said charter void.

SECTION 13. Within thirty days after the passage of this ordinance said company shall file with the recorder of the town of North Des Moines a written acceptance of the grant herein above made, with the conditions, regulations and limitations therein expressed, signed by the president and secretary of said company, and upon failure to file such acceptance as aforesaid, the above grant shall not become operative to vest any rights privileges or franchises, whatsoever in said company or its assignees. O. P. July 6, 1886.

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942 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

943 EXHIBIT No. 33. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 65, July 26, 1886.

Notice of the Des Moines Street Railway in relation to the use of streets and Locust street bridge by the Broad Guage Street Railway operating against the same—Ref. to Com. on Sts. & Alleys & Solicitor.

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944 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

945 EXHIBIT No. 34. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 98, August 16, 1886.

Resolved, That the Des Moines Broad Guage Street Railway Company be and it is hereby granted permission to build and operate its street railway along Sycamore Street from East Twelfth Street East to the East corporate limits of the City of Des Moines. The same to be constructed and operated under and in accordance with the charter heretofore granted said Company. Offered by Leander Bolton.

Alderman Bolton moved that the foregoing Resolution be adopted. Ald. Egan moved to amend by referring to Committee on Streets and Alleys. Roll Call. Yeas, Egan, and Morris—2—Nays—Bolton, Chaffee, Conrad, & Weitz—4—Absent Drady, King & Macy—3—The vote recurring on the original motion; On Roll Call the yeas were Bolton, Chaffee, Conrad, & Weitz 4—Nays Egan & Morris—2—Absent Drady, King & Macy—3—.

Motion declared lost.

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946 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

947 EXHIBIT No. 35. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 100, Aug. 17, 1886.

An ordinance to amend an ordinance authorizing the construction and operation of certain Street Railroads in and along the streets of the City of Des Moines. Adopted December 10th, 1866, and amendments thereto was passed February 5, 1872, was read a 1st time and laid over under the rules.

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948 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

49 EXHIBIT No. 36. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 103, August 20, 1886.

Ald. Weitz offered the following resolution. Resolved by the City ouncil of the City of Des Moines that consent, permission and au- ority is hereby given to the Des Moines Broad Guage Street Rail- ay Company to construct and operate their street railroad on East ycamore street from East 12th street to the East Corporation Line f said City; Provided that the same shall be built and operated nder and in accordance with the charter of said company by ordi- ance adopted June 29, 1886. (Approved by the Mayor.)

Ald. Chaffee offered the following amendment, viz:

Provided however this company shall first lay track upon the me street between the New Fair Grounds and the City Limits— oll Call on the amendment as follows—yeas Chaffee, Egan—(2)— ays—Bolton, Conrad, Drady, Morris, & Weitz (5) Amendment st The motion then recurring on the original motion to adopt e resolution as offered by Ald. Weitz was adopted on roll call as llows, Yeas Bolton, Chaffee, Conrad, Drady, Morris, & Weitz— 6)—nays—Egan—(1) absent King & Macy—(2) Approved by e Mayor.

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50 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

51 EXHIBIT No. 37. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 136, Sept. 14, 1886.

Ald. Drady offered the following:

Res*l*oved by the City Council of the City of Des Moines That onsent, permission, and authority is hereby given to the Des Ioines Broad Guage Street Car Company to construct, maintain nd operate their street Railway on West 4th Street in the City of Des Moines from Locust Street to Court Avenue, said road to consist f not more than a single track, provided that the same shal- be uilt and operated under and in accordance with the charter of aid Company by ordinance June 29, 1886.

On motion of Ald. Drady the foregoing resolution was adopted

on Roll call as follows, Yeas—Bolton, Chaffee, Conrad, Egan, Morris, & Weitz—7—Absent, King & Macy—2—Nays none.

Approved by the Mayor as follows:

Approved Sept. 15, 1886, J. H. Phillips, Mayor.

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952 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

953 EXHIBIT No. 38. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

Book M, Page 137, Sept. 14, 1886.

Ald. Bolton offered the following resolution,

Resolved by the City Council of the City of Des Moines, That consent, permission and authority is hereby given and granted to the Des Moines Broad Guage Street Railway Company to construct and operate a single track Street Railway upon 6th Street in West Des Moines from Vine Street to and across School Street together with two switches not to exceed one hundred and forty feet in length so situated as may be necessary to the convenient operation of said road, Provided said track shall be laid and operated in accordance with the charter of said company. On motion of Ald. Bolton the foregoing resolution was adopted by the following vote, Yeas, Bolton, Conrad, Drady, Egan & Weitz (5) Nays Chaffee & Morris (2) Absent King & Macy (2)

Approved by the Mayor as follows

"Approved Sept. 15, 1886, J. H. Phillips, Mayor."

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954 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

955 EXHIBIT No. 39. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

An ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Adopted December 10, 1866, and amendments thereto, passed February 5, 1872.

0.362. P. September 16, 1886.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That the ordinance authorizing the construction and

operation of certain street railroads in and along the streets of the City of Des Moines, adopted December 10, 1866, together with the amendments thereto, adopted February 5th, 1872, be and the same is hereby amended so as to read as follows:

SEC. 2. That consent, permission and authority *is* hereby given and granted to and duly vested in the Des Moines Street Railway Company, its successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches, in, upon, and along such of the streets or parts of streets of the City of Des Moines as are now occupied by the tracks of said railway company in actual use, except as hereinafter provided, and upon such alleys only fronting on which said company has depots, stables or car houses, and upon no other streets or alleys, unless upon application to the City Council the right to so use and occupy other streets and alleys shall be hereafter granted, and authority is hereby given said company, its successors and assigns, to keep, maintain, use, and operate said railway cars in the manner for the time and upon the conditions hereinafter mentioned and prescribed and upon such other conditions and upon such further reasonable regulations as the City Council may at any time prescribe.

SEC. 3. The cars to be used upon such tracks shall be operated with animal power only and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this state shall be used upon
956 any of said tracks.

SEC. 4. Said tracks and Railways shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities, provided; said company shall at all times have the right to use their track for transporting iron, ties and other material for constructing its road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may hereafter be entered into by and between the city of Des Moines and said company.

SEC. 5. The tracks of said railway shall be laid so as to conform to the established grades of the streets upon which the road may be built, wherever the city has or may have established such grades; where the streets are not at the established grade said company must, until they are so graded, lay its tracks so as to conform to the surface of such streets; provided, that it shall raise or lower the same to grade whenever the city shall grade said streets or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve the space betwe-n the rails of its track so that it shall substantially correspond with the improvements of the street outside of the track; provided, said company shall plank the space between the tracks at each principal street crossing, and shall, where its tracks are laid upon paved streets, make the top surface of the rails level with the surface of the adjacent pavement,

and shall in crossing bridges make the top surface of its rail level with the floor of such bridges.

SEC. 6. The said City of Des Moines shall not be liable to said company for any damage that may be occasioned by the breaking of any gas or water pipes or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes or the necessary repairing of the same, or from the improvement of any street, unless there be unreasonable delay in making such repairs.

957

SEC. 7. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them except where a double track is contemplated or where some other company is or shall hereafter be authorized to lay a track on the same street, in either of which last named cases the tracks shall be laid at such distance from the center of the street that the center of the street shall be an equal distance from the nearest rail of each of the two lines of road, and the distance from the center of the street to the nearest rail shall be fixed by the City Engineer. And, provided, further, that if any other street railway company shall hereafter be granted the right to lay its tracks upon any street or part of street upon which the Des Moines Street Railway Company or its assigns, shall have a track or tracks of its railroad, then laid, it shall, on demand of said other company remove its track or tracks to such distance from the center of said street that the center of the street will be equal distance from the nearest rail of the two roads when built; provided, however, that before it shall be required to make said removal the company desiring the same shall pay or tender the costs of making such change. And if upon such demand and tender of the cost of such removal, the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshall, under the supervision of the City Engineer, at the cost of the company desiring such change, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided.

958

SEC. 8. Where any line of railway shall be extended along and upon any such alley, as provided for in section one, a single track only shall be laid, and no side-tracks, switches or turn-outs except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid, up and along streets, shall be allowed on any such alley. Provided, however, that if said company shall have its depots, stations, stables or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car houses.

SEC. 9. The rate of fare upon any one line or route of railway shall not exceed six cents for each passenger for any distance on such route.

SEC. 10. The cars of said company shall be entitled to the track, and in all cases any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person willfully or maliciously

obstruct, hinder or interfere with any of said railway cars, by placing, driving or stopping, or causing to be placed or driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell or otherwise, and whoever shall willfully violate any of the provisions of this section, shall, upon conviction thereof before the Police Judge of said city, be fined in any sum not less than five nor more than twenty-five dollars.

SEC. 11. The right herein granted to said company to operate said railroad shall continue for the term of thirty years from the time the first mile of said track was laid and cars running thereon and no longer; provided, that nothing herein contained shall be construed to extend the rights of said company beyond the period of thirty years from the time the first mile of track was laid, nor to vest said company with any rights not now possessed under their original charter.

SEC. 12. The cars or carriages of the company shall be
959 run upon and along the tracks of said railway company in conformity with the following rules and regulations to-wit:

First. No car shall be run at a greater rate of speed than eight miles an hour, but all cars shall maintain an average speed of six miles per hour including stops between the terminal of any line.

Second. While cars are turning corners from one street to another the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near — at stations.

Fourth. No cars shall be left to remain standing on any street at any time, unless a team is attached thereto and the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street, or to take on or leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one on or near the track the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when near-
960 ing the track of any other railway company.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of other railway companies, at which excepted stations they may stand a longer time.

Twelfth. Cars shall start from both ends of any line as early as six o'clock A. M. and run continuously as late as twelve o'clock midnight; from six to nine o'clock A. M. and from nine o'clock P. M. to midnight cars shall run at intervals of not more than fifteen minutes, and from nine o'clock A. M. until nine O'clock P. M. cars shall run at intervals of not more than eight minutes.

Thirteen. Each of said cars shall be provided with a driver and a conductor, unless said railway company shall place in said cars not provided with a conductor a box or receptacle in which the passenger may himself deposit the fare.

Fourteenth. The horses drawing such cars shall travel between the rails of the track of said railway, except wherever the ascending grade is such that an additional horse is necessary. Provided, that when space outside of the rails is used upon paved streets the company so using such space shall pave the same or pay for paving so used and shall keep the same in repair.

SEC. 13. Ordinance No. sixty-three, passed December 10, 1866 and ordinance one hundred and thirty-four, passed February 5, 1872, are hereby repealed.

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961 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

962 EXHIBIT No. 40. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 144, September 27, 1886.

City Solicitor made the following report To the Hon. Mayor and City Council:

Referring to the following resolution "Resolved that no street railway company shall proceed to lay their rails upon the streets of the city of Des Moines, or tear up the paving upon said streets without filing with the City Engineer a notice of their intentions so to act at least three days before commencing to lay said rails, and in no event shall rails be so laid or paving torn up other than between the hours of seven A. M. and six P. M. without permission of the City Council."

The Council having the right to make all reasonable rules and regulations as to the use of the streets. The requiring of the notice above contemplated *to* in my opinion would not be unreasonable. It only calls for an expression of intention upon the part of the

company. This in many instances might be necessary for the interest of the city. As it would give the Council an opportunity to act in relation thereto as its wisdom would suggest. The Council has the power to impose reasonable restrictions as to the time work should be performed on the streets, and if in its opinion injury to persons or damage to property might result by tearing up of the streets in the night, or that work would disturb the public quiet, or that the paving cannot be relaid under the supervision of the City Engineer as provided by ordinance reasonable restrictions may be imposed as to what would be a reasonable time in which such work should be performed I leave for the Council to determine. When The Council has demanded of said company that a certain amount of work be performed within a stated time, or when work might be necessary to protect the property of the Company, permission should be granted therefor.

Respectfully submitted.

JAMES H. DEITRICK, *Solicitor.*

963 On motion the report was adopted on roll call as follows, yeas, Chaffee, Egan, King, Macy & Morris—5—Nays Bol, Conrad, Weitz—3—Absent (1) Drady—1—

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964 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

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965 EXHIBIT No. 41. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 156, Oct. 4, 1886.

Ald. King offered the following: Resolved that the City solicitor is hereby directed to inquire whether the action of the rival street railway companies of this city are injuring the public highways of the city in tearing up the paved streets has not reached a point where the Mayor would be justified in using the police force of the city to prevent said companies from interfering with the safety of public travel and the injury of the paved streets and to arrest any person or persons found guilty of tearing up the street pavements of this city without first having received permission in writing from the Mayor pending a revision of the charter granted to the companies aforesaid.

On motion adopted. Approved by the Mayor.

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966 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

967 EXHIBIT No. 42. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 155, Oct. 4, 1886.

Ald. Weitz offered the following resolution: Resolved by the City Council of the City of Des Moines That consent, permission and authority is hereby given to the Des Moines Broad Guage Railway Company to construct and operate their street railway on East Locust Street from 5th to 6th street with one track on the south half of said street and from 6th to 7th street with a double track. Provided that the same shall be built and operated under and in accordance with the charter of said company by ordinance adopted June 29, 1886. On motion of Ald. Macy the resolution was referred to Solicitor. On Roll Call—yeas—Chaffee, Egan, King, Macy, Morris—5—nays Bolton, Conrad, & Weitz—4—to Report at 9 A. M. tomorrow.

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968 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

969 EXHIBIT No. 43. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 161, Oct. 5th, 1886.

To the Hon. Mayor and City Council.

GENTLEMEN: As to the power of the Council to grant to the Des Moines Broad Guage Street Railway Company the right to construct and operate a parallel line with the Des Moines Street Railway between East 5th and 6th street on Locust. In my opinion the well considered decision of Judge Henderson in regard to the status of the respective companies settles the question here presented so that there needs no elaboration or citation of authorities from me upon this point. I understand that decision to hold, and the law to be, that if such line of road is necessary for the Des Moines Broad Guage Company to occupy said part of street in order that it may perfect and make a continuous line of its road then the Council has the power to grant said permission but the construction of said road on said part of street must be necessary and permission asked in good faith for the purpose and object as above stated.

(Sgd.) JAMES H. DEITRICK,
City Sol.

Ald. Weitz offered the following resolution- Resolved by the City Council of the City of Des Moines, That consent, permission and authority is hereby given to the Des Moines Broad Guage Street Railway Company to construct and operate their street railway on East Locust street from 5th to 6th street with one track on the South half of said street and from 6th to 7th streets with a double track Provided that the same shall be built and operated under and in accordance with the charter of the said company by ordinance adopted June 29, 1886.

(Sgd.) WEITZ.

Ald. Weitz moved to adopt. Ald. Macy moved to return Resolution to the company with request that they state that it is necessary for their Railroad—Amendment lost on roll call as follows—
970 yeas—Macy—1—Bolton, Conrad, Drady, Egan, King, Mosris & Weitz—7—absent Chaffee—1—motion to adopt the resolution was carried on roll call yeas, Bolton, Conrad, Drady, Egan, King, Macy, Morris & Weitz (8) absent Chaffee (1).

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971 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

972 EXHIBIT No. 44. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the Circuit Court of the State of Iowa in and for Polk County.

DES MOINES STREET RAILROAD COMPANY,
vs.
CITY OF DES MOINES, J. H. PHILLIPS, Mayor, and A. H. BOTKIN, City Marshal.

Petition in Equity.

The plaintiff the Des Moines Street Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa, humbly complaining of the defendants the City of Des Moines, J. H. Phillips, Mayor, and A. H. Botkin, City Marshal, respectfully shows to the Court:—

That heretofore, to-wit: on the 10th day of December, 1866, the city of Des Moines by ordinance granted to the Des Moines Street Railway Company and its successors and assigns, certain rights and privileges in and to the streets of the city of Des Moines, a copy of which ordinance is hereto attached and made a part hereof, marked Exhibit A.

That under and by virtue of said ordinance the said Des Moines Street Railway Company proceeded to lay its tracks upon various streets of the said city, and did at various times make extentions

and improvements thereon, investing a large amount of money in laying tracks and equipping their various lines of street railroad in the city of Des Moines and so continued to use and exercise the rights given by the said franchise until the present time without interruption or disturbance until the dates hereinafter mentioned.

That within the time limited by the said ordinance the Des Moines Street Railway Company filed its acceptance of the provisions thereof and agreed to comply with all of the stipulations and conditions therein contained, a copy of which acceptance is heretofore attached and made a part hereof marked Exhibit B;

973 That after the acceptance of the said contract or ordinance and within the time provided by Section 9 thereof the said Company entered upon the construction of the lines of railway therein contemplated, and in all respects performed the covenants and contracts of the said ordinance upon its part to be performed. That from time to time, and from year to year, in every year thereafter until the sale and assignment by the said Des Moines Street Railway Company to this plaintiff of its rights, as hereinbefore set out, and at all times in reliance upon the terms and conditions of the said contract, and especially on the provisions of Sec. 10 thereof, and the covenants therein contained, and upon the faith of the re-enactment of the said ordinance hereinafter more fully stated, it had expended in the construction of the said lines of railway track along the streets of the said city, and the necessary fixtures and appliances for the operation thereof such sums of money that at the time of the sale and assignment hereinbefore set out the sum largely exceeded $100,000. That all of said expenditures were made with a full knowledge upon the part of said city, its mayor and council, that the same was being done without any prospect or expectation of realizing any profits whatever from the receipts and earnings of the said railroad unless it was entitled to the enjoyment of the grant made by said ordinance for the time and according to the terms thereof. And the said city did not by its mayor or council or any other officer or person authorized to act for it, at any time or

974 in any way dissent from what it knew, and the said mayor and council and all of them knew, to be the understanding and expectation of said Railway Company as to its rights under said contract, and the true and proper construction thereof, but did at all times and from year to year suffer and permit said railway company to construct and lay its tracks along the several streets of said city and to make the expenditures aforesaid.

That subsequent to the passage of the said original ordinance, to-wit, on the — day of ——, 1874, the city of Des Moines by ordinance then known as ordinance No. 63 re-enacted all and singular the provisions of the original ordinance of December 10, 1866, and the amendments made thereto up to the year 1874, said re-enacting ordinance being found at page 220 of the city ordinances of the city of Des Moines as re-enacted revised and published in the year 1874, and expressly fully and explicitly recognized all and singular the provisions of the said ordinance, and having the power then and there so to do, did by its re-enactment of Sec. 10 of the said ordi-

nance give, grant, vest and re-confirm and reinvest the said Des Moines Street Railway Company with all and singular the rights and privileges granted by the original ordinance and especially all and singular the rights and privileges granted by Sec. 10 thereof. That pursuant to the said original ordinance and re-enactment thereof as last above stated the said Des Moines Street Railway Company did continue in the expenditure of money in laying tracks and the equipment of its lines as hereinbefore more fully stated, and did upon the faith of the said privileges granted in the original ordinance and upon the faith of the re-enactment thereof by the city of Des Moines, and of the re-confirmation of the covenants of the city of Des Moines that it would not in any wise impair the rights of the said Des Moines Street Railway Company by granting like privileges to any other person or corporation proceeded with its expenditure of money and material in the develop-
975 ment of its various street railway lines in the city of Des Moines. That the said street railway continued its expenditure thereunder in reliance upon the privileges therein granted and upon the covenants of the city of Des Moines hereinbefore more fully referred to as embodied in the provisions of Sec. 10 of the said ordinance and re-enactment already referred to.

That on the 6th day of October 1879, the city of Des Moines again by ordinance numbered 63, and contained in page 238 and the following pages of the revised ordinances of the city of Des Moines for 1879, as enacted and published did re-enact all and singular the provisions of the said ordinance granting the rights and privileges hereinbefore referred to upon the Des Moines Street Railway Company, and did re-enact and adopt all of the provisions of Sec. 10 of the said ordinance and did re-confer and re-grant and re-invest the said Des Moines Street Railway Company with all and singular the rights and privileges of the said ordinance and did make and renew all of the covenants of Sec. 10 thereof. That the said Des Moines Street Railway Company did again accept of the re-grant and re-investiture of the privileges as contained in the said re-enacted ordinance and did proceed upon the additional assurance thus tendered in the manner hereinbefore set out by the city of Des Moines, of protection in its rights in the premises, to expend additional large sums of money in the further development and extention of its tracks and equipments in reliance upon the exclusive privileges given by the said ordinance and the right of occupancy of the streets of the city of Des Moines as therein provided, and as re-enacted and re-confirmed in the various re-enactments thereof as hereinbefore set forth and in the recognition by the city of the said ordinances in various other ways, and by the amendments thereto as will be shown on the trial hereof.

That on or about the first day of July 1886, the said Des Moines Street Railway Company conveyed, sold and assigned, all of
976 its rights and privileges under the ordinance to the plaintiff herein the Des Moines Street Railroad Company for the consideration of $229,000, then paid, and that the plaintiff Company is now the assignee of all and singular the rights and privileges granted

by the city of Des Moines by virtue of the said ordinance, a copy of which is already hereto attached.

That up to the date there have been about twelve miles of track laid at an expenditure including equipments rolling stock, etc. of not less than $175,000. That the city of Des Moines is a city with a rapidly increasing population and that with the increasing growth of the city comes the necessity for additional extensions of its lines of railway not only for the purpose of accommodating the public with street railway facilities, but for the purpose of preserving the value of the plaintiff's property, and that without such right of extension the plaintiff's property would become valueless. That the plaintiff in the extension of its lines did under the rights and privileges hereinbefore more fully referred to and granted by the city of Des Moines, on the 12th day of October, 1886, commence a projected extension upon Sycamore street from Twelfth street to which point its line is now constructed, to west Nineteenth street on said Sycamore street, and did on the morning of the day aforesaid place upon the street near the intersection of Twelfth with Sycamore street its employés for the purpose of extending the said tracks. That immediately upon learning of the same the defendant the mayor of the city of Des Moines placed in the hands of the city marshal written instructions to prevent the construction of the said line of railway or any portion thereof, and the said city marshal did direct his aids and assistants to proceed to the point above indicated and arrest and cause to be arrested all of the persons engaged in so doing, being the employés of the said company, and that the defendant the said mayor, has instructed the city marshal to prevent the construction of the said line by causing the arrest of all parties engaged
977 in said work.

That the plaintiff is hereby obstructed and prevented from pursuing its purpose of extending its line of railway *of* above indicated which the plaintiff entered upon with a view of conforming to all reasonable requirements of the city of Des Moines, and all of the requirements of the ordinances hereinbefore referred to, by laying its track in the proper manner, and conforming it to the grade of the said street, and operating the same in accordance with the provisions of the said ordinance.

That unless the defendant its officers and agents are restrained from interfering with and obstructing the work of the plaintiff and restrained from causing the arrest of the plaintiff's employés great disturbance will ensue and a possible breach of the peace occur which can only be prevented by an injunction restraining the said parties from in any way interfering with the construction of the said proposed extension of the plaintiff's railway lines. Wherefore plaintiff prays that the defendants and each of them together with all of their officials, officers and agents of the city of Des Moines be restrained and enjoined from interfering with or obstructing in any manner or from arresting or interfering in any other way with the construction of the said extension of the plaintiff's track upon Sycamore street from Twelfth street westward, as in this petition described, and that the said defendants and each of them be restrained and enjoined

from interfering in any way or manner with any other of the extentions that may hereafter be projected by plaintiff, and for all further and adequate relief, and for costs.

NOURSE, KAUFFMAN & GUERNSEY &
PARSONS & PERRY,
Attorneys for Plaintiff.

STATE OF IOWA, *Polk County, ss:*

I, Frank A. Sherman, on oath state that I am the secre-
978 tary of the Des Moines Street Railroad Company, plaintiff in the above entitled cause; that I know the facts set forth in the above petition and the contents thereof, and that the averments therein contained are true, as I verily believe.

FRANK A. SHERMAN.

Sworn to before me and subscribed in my presence by the said Frank A. Sherman at Des Moines, Iowa, this 24th day of October, 1886.

[SEAL.] N. T. GUERNSEY,
Notary Public in and for Polk County, Iowa.

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

979 EXHIBIT No. 45. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the Circuit Court of the State of Iowa in and for Polk County, September Term, 1886. In Equity.

DES MOINES STREET RAILROAD COMPANY
vs.
THE CITY OF DES MOINES, J. H. PHILLIPS, Mayor, and A. H. BOTKIN, City Marshal.

Answer.

The defendants for answer to the petition filed herein states. That on the 14th day of September 1886, the defendant the City of Des Moines, through and by its common council and by virtue of the powers granted said defendant as a municipal corporation and in pursuance of the authority this conferred did duly pass and publish an ordinance entitled "An ordinance authorizing the Construction and operation of certain street railroads in and along the streets of the City of Des Moines adopted December 10th, 1886 and amendments thereto passed February 5th, 1872.

That by the provisions of said ordinance as set forth in section 13 thereof it was expressly ordained that the ordinances heretofore

passed by said council being ordinance #63 passed December 10th, 1886, and ordinance #131 passed February 5th 1872 and set out in plaintiff's petition as exhibit "A" were repealed.

That the only authority right or privilege ever granted to plaintiff by the said defendant the City of Des Moines to lay its track on or along the streets of said City. And to operate its cars thereon were granted by said ordinance last past by said City and that said plaintiff acquired no rights, privileges, or authority to lay its track on and along the streets of said city and to operate its cars thereon by virtue of the said ordinance attached to plaintiff's petition marked exhibit "A" and made a part thereof. And that said plaintiff has never in any manner or by any authority acquired any rights or privileges to lay its track upon said streets and operate its
980 cars thereon other than the rights and privileges granted by said ordinance as aforesaid.

A copy of said ordinance is hereto attached marked exhibit "B" and made a part of this answer.

That by the provisions of said ordinance passed by said council on the 14th day of September 1886 consent permission and authority was granted said plaintiff to lay a single or double track for passenger railway lines upon and along such of the streets or parts of the streets of the City of Des Moines as were then at the date of the passage of said ordinance occupied by the tracks of said railway company in actual use except as therein provided, and upon such alleys only fronting on which said company has depots stables or car houses, and upon no other streets or alleys unless upon application to the City Council the right to so use and occupy other streets and alleys shall be hereinafter granted.

That the said plaintiff, its officers, and agents wholly refused and neglected to make application to said City Council as by ordinance provided for permission to lay its track on and along said Sycamore Street from 12th to 19th sts. and to operate its cars thereon. And that no authority right or privilege has ever been granted plaintiff by said City Council either by ordinance, resolution or consent to lay its track or operate its cars upon said street, or upon any street of said City other than those occupied by said company at the time of the passage of said ordinance.

That the acts of plaintiff in laying and attempting to lay its track upon said street and to operate its cars thereon are in direct and open violation of the provisions of said ordinance and in excess of any authority rights or privileges ever granted to said plaintiff by the said City or ever acquired by plaintiff to so lay its track and operate its cars.

981 That the said plaintiff never used said Sycamore Street or attempted to use the same for the purpose of laying its track or operating its cars thereon prior to the 12th day of October 1886 and at the time of the passage of said ordinance aforesaid it had no right or privilege to so lay its track or operate its cars and no authority rights or privileges were granted thereto by said ordinance.

Defendants further answering states—

It is admitted that the City of Des Moines is a municipal corporation duly organized under the laws of Iowa, and that the said defendant J. H. Phillips is mayor of said City and that the said Botkin is city marshal thereof and that the said J. H. Phillips as mayor of said City did in the manner charged by plaintiff prevent the said plaintiff from entering upon said street for the purpose of laying its track upon and along the same, but that the acts therein complained of were done by said defendants in their official capacity, as Mayor and Marshal of said City and by virtue of the authority vested in them as officers thereof and for the sole purpose of enforcing the ordinances of the said City.

Defendants deni*es* that the acts herein complained of were in violation of any rights or privileges granted plaintiff by said City Council or of any rights required by plaintiff to lay its track upon and along said street and to operate its cars thereon, and defendants deny each and every allegation in plaintiff's petition not herein expressly admitted.

Wherefore defendants demand that plaintiff's petition be dismissed and that it be ordered that the rights and privileges of the said plaintiff be confined and limited within the ordinance herein set forth, and that the acts of the said defendants herein complained of be decreed valid and within the rights and authority of said defendants and that complainant pay the cost herein.

982 JAMES H. DEITRICK,
CUMMINS & WRIGHT,
Att'y- for Defendants.

STATE OF IOWA, *Polk County:*

I, J. H. Phillips Mayor of City of Des Moines on oath say that I have read the above answer and know the contents of the same and that the statements therein are true as I verily believe.

J. H. PHILLIPS.

Sworn to before me and subscribed in my presence by the said J. H. Phillips Mayor at Des Moines, Iowa this 29th day of October 1886.

[SEAL.] JAMES H. DEITRICK,
Notary Public, Polk County, Iowa.

(Endorsed:) Filed Sept. 15, 1903. E. R. Mason, Clerk.

983 EXHIBIT No. 46. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 185, Oct. 15th, 1886.

Ald. Bolton offered the following resolution Resolved by the City Council of the City of Des Moines that consent permission and au-

thority is hereby granted to, and conferred upon the Des Moines Broad Guage Street Railway Company its successors and assigns to construct, maintain and operate a single or double track of its street railway together wi// all necessary and convenient switches and turn-outs over and along the streets in said city hereafter set forth Provided said railway track or tracks and switches and turn outs shall be laid and operated in accordance with the ordinance of the City and the charter granted said company June 29, 1886, and provided the same be laid under the directions of the Engineer. The Streets and parts of streets above referred to are as follows—

West Side.

West 5th from Court avenue to north side of "Mulberry from 5th to 6th street, sixth street Mulberry to North side of Walnut—West Walnut street from 6th to west side of 12th, 12th street to north side of Sycamore, West Sycamore from 12th west side of 15th—West 15th from Sycamore to north side of High, West High from 15th to west side of 17th, West 17th from High to north side of Center, west on Center to west side of Warren, north on Warren to north side of Cottage Grove, westerly on Cottage Grove Ave. to west side of 21st, North on 21st st. to north side of Atkins street, Atkins street to west side of 24th street, North on Twenty-fourth street to north side of North, west on North to Drake University. West 4th street from Locust to north side of center, Center street from 4th to west side of 5th street, 5th street from Center to School.

East Side.

East Sycamore street from 5th to 6th, East 6th street from south line of Sycamore to N. side of Maple, East Maple to East side of Pennsylvania Avenue, Pennsylvania Avenue from Maple to north side of Filmore street, East Filmore street from Pennsylvania,
984 to East side of Ninth, East Ninth street north to corporation line, East Sycamore street from East Ninth to 12th street.

Ald. Macy moved that the resolution be referred to Committee on Railroads. Ald. Bolton moved to amend by adopting the resolution Roll call on motion to adopt, yeas. Bolton, Conrad, Drady/ Egan & Weitz, 5—Nays Chaffee Macy & Morris—3—absent King (1) (not approved by the Mayor).

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985 (Endorsed:) Filed Sep. 15, 1903. E. R. Mason, Clerk.

86 EXHIBIT No. 47. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 192, Oct. 21st, 1886.

On the resolution passed October 15th in regard to the route of Broad Guage Street Railway was returned with his recommendations or a different route, and his reasons for his not approving the said esolution (see resolution recorded on Page- 185 & 186 also see layor's report on file) Ald. Bolton offered the following resolu- on—Resolved by the City Council of the City of Des Moines, That onsent, permission, and authority *is* hereby given and granted to e Des Moines Broad Guage Street Railway Company to construct nd operate a single or double track of its street railway together ith all necessary and convenient switches and turnouts over and long the foll/owing streets in East Des Moines. Sycamore street om the west side of 5th street to the east side of 6th street—Sixth reet from Sycamore street to the north side of Maple street—laple street from the West side of 6th street to the east of Pennsyl- ania Avenue, Pennsylvania Avenue from the south side of Maple reet to the north side of Filmore St., Filmore street from the west de of Pennsylvania Avenue to the east side of 9th street, Ninth reet from south side of Filmore north to corporation line—Sycamore reet upon the south side thereof from the west side of 9th street the east side of 12th street Provided, That said tracks shall be id in accordance with the charter of said company (ordinance of ne 29, 1886) and under the supervision of the City Engineer.

Ald. Bolton moved to adopt the foregoing resolution. Roll Call, eas. Bolton, Chaffee, Conrad, Brady, Egan, Macy, Morris & Weitz 8—Absent (1) Approved Oct. 21st, 1886, by the Mayor J. H. hillips.

Ald. Bolton off-red the following resolution—Resolved by the ity Council of the City of Des Moines, That consent, authority and rmission *is* hereby given and granted to the Des Moines Broad Guage Street Railway to construct and operate a single track 87 over its street railway together with convenient and necessary side tracks, switches, and turn-outs over and alon- est 4th reet, and Center street, from the south line of Locust st to the rth line of School street. Provided said tracks shall be laid under e supervision of the City Engineer and in accordance with the harter of said company and provided further that there shall be single track only and no side tracks or switches on said 4th street uth of Center street."

Alderman Bolton moved the adoption of the foregoing resolution. oll Call, Yeas—Bolton, Conrad, Egan, & Weitz—5—Nays—Chaf- e, Macy & Morris—3—Absent King (1) Oct. 22d, 1886—This solution as to 4th street from Locust street to Center street and

thence west on Center street to the west line of north 4th street, Thence north to School street, is approved.

(Sgd.) J. H. PHILLIPS, *Mayor.*

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988 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

989 EXHIBIT No. 48. J. B. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 212, Nov. 1st, 1886.

To the Honorable Mayor and City Council of the City of Des Moines, Iowa:

You are hereby notified that the Des Moines Broad Guage Street Railway Company has selected west 6th street in the City of Des Moines from Vine street to School street to lay and operate a single track with one switch not to exceed 140 feet in length of its street railway and accept the resolution granting it such right.

(Sgd.) DES MOINES BROAD GUAGE STREET RAILWAY,
By G. VAN GINKEL, *Pres't.*

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990 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

991 EXHIBIT No. 49. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 213, Nov. 1st, 1886.

To the City of Des Moines *of* the Council thereof:

You are hereby notified that the Des Moines Broad Guage Street Railway Company accepts the license or consent of the City to lay its tracks as between 5th & 7th street on East Locust street in said City as of this date allowed by resolution and said company will lay its tracks thereon at once and operate the same.

Des Moines, Iowa, Oct. 5th, 1886.

(Sgd.) DES MOINES BROAD GUAGE RAILWAY CO.,
By BAYLIES & BAYLIES.

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992 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

993 EXHIBIT No. 50. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 237, Nov. 23rd, 1886.

The Council met pursuant to call His Honor the Mayor in the chair—Roll Call—Present, Bolton, Chaffee, Drady, Egan, Morris & Weitz—6.

The Mayor stated the call to be for the purpose of considering the matter of removing the tracks of the Narrow Guage R. R. on E. Locust St. Bt. 5th & 6th streets and other Street Railway matters.

Ald. Bolton offered the following resolution—Whereas, East Locust street between East 5th and 6th street is obstructed by the tracks of two street rail roads, and the south track owned by the Des Moines Broad Guage Street Railway Company and the other and center track by the Des Moines Street Railroad Company, and Whereas—The said street rail road tracks as they are now located are a great detriment to public travel making the passage of said street dangerous to vehicles and the lives of their occupants, and Whereas—The condition of said street on account of the location of street railroad tracks thereon has driven travel to other adjoining streets thereby to the loss of merchants doing business and owning property on said street to the extent that they have petitioned the Mayor and the City Council for relief.

And whereas—The interests of the City and Tax payers demand that the city council take some action to protect its citizens and visitors from danger of accident and its merchants owning property and doing business on said street from loss of trade and the depreciation of real estate. And Whereas—The City Engineer did locate the street railroad track on the south side of said street in contemplation of the removal of the street railroad tracks then occupying the center of said street to a point or position further north to
994 admit of the safe passage and transit of vehicles and the public over said street for pleasure or business purposes.

Therefore Be it resolved by the City Council of the City of Des Moines, That the City Marshal under the supervision of the City Engineer, is hereby directed and ordered to forthwith remove and relay the street car tracks now occupying the center of East Locust street from East Fifth & Sixth street to the location originally contemplated by the City Engineer viz: The south rail thereof to be 21/2 feet north of the center of the street. The Removal to be done in a substantial and workmanlike manner placing the curves and making the connections so as not to interfere with the continuous operation of said tracks by its owners after such removal has been made. Ald. Bolton moved to adopt—Ald. Macy moved the following resolution as a substitute: Whereas certain citizens have petitioned for the extention of the track of the Des Moines Street Rail-

way on West Sycamore Street, Whereas the Marshal has failed to remove the tracks of the Des Moines Street Railway on East Locust Street, and there is a petition of citizens before this Council for said removal. Therefore be it resolved—That it is the sense of this Council that the Marshal be and he is hereby instructed to remove the track of the Des Moines Street Railway on East Locust street 2½ feet from the center of said street as asked for. And it is further resolved—That permission is hereby given to the Des Moines Street Railway to extend their tracks on West Sycamore street as set forth in petition of citizens now on file in the Clerk's office. Provided that the Des Moines Street Railway Company shall not lay down its track upon West Sycamore street until the track of said Des Moines Street Railway shall have been removed as herein ordered on East Locust Street.

Ald. Macy moved the foregoing resolution as a substitute for Ald. Bolton's—Roll Call—Yeas, Chaffee, Macy & Morris—(3).

995 Nays, Bolton, Conrad, Brady, Egan & Weitz—5—Absent King—1. Substitute lost. On the original motion by Bolton—Roll Call, Yeas, Bolton, Chaffee, Conrad, Brady, Egan, Macy, Morris, & Weitz.—8. Absent King—1. Approved by the Mayor.

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996 (Endorsed:) Filed Sep. 15, 1886. E. R. Mason, Clerk.

997 EXHIBIT No. 51. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 239, Nov. 23d, 1886.

Ald. Chaffee offered the following resolution—

Resolved by the City Council, That consent, permission and authority *is* hereby granted to the Des Moines Street Railroad Company to construct and operate a line of street railway under the provisions of its charter and of the ordinances of the City of Des Moines, upon and along West Sycamore street westward from 12th street to Seventeenth street—

Ald. Chaffee moved to adopt but before a vote was taken withdrew said Resolution from the Council. Ald. Bolton offered the following resolution—Resolved by the City Council of the City of Des Moines, That the Des Moines Broad Guage Street Railway Company is authorized to construct and operate a single or double track of its street railway upon and along the following streets in West Des Moines in the City of Des Moines to-wit—West 5th street from Court Avenue to north side of Mulberry st., Mulberry st. from 5th to 7th street, West 7th to Walnut st., West Walnut from 7th to west side of 12th st., 12th street to north side of Sycamore st., West sycamore from 12th to west side of 15th street—(Provided that only a single track be laid on Sycamore between 12th & 15th), 15th st

from Sycamore street to the north side of Linden st., Linden street from East side of 15th st. to west side of 16th street, 16th street from south side of Linden st. to the north side of High street. High street from East side of 16th st. to west side of 17th st., 17th street from south side of High st. to north side of Center street, Center street from east side of 17th street to west side of 18th street, 18th street from the south side of Center street to the north side of Crocker street, Crocker st. from East side of 18th st. to Cottage Grove
998 Avenue, Cottage Grove Avenue from Crocker street to the west side of 21st street, 21st st. from south side of Cottage Grove Avenue to north side of Atkins street, Atkins street from east side of 21st street to west side of 24th street, 24th street from south side of Atkins street to north side of North street, North street from east side of 24th street to Drake University, Provided said road shall be constructed in accordance with the charter of said company adopted June 29, 1886.

Ald. Bolton moved to adopt the foregoing resolution, Roll call—Yeas, Bolton, Conrad, Drady, Egan & Weitz—5—Nays, Chaffee, Macy, Morris,—3—Absent King—1. Approved by the Mayor Nov. 24 86. Ald. Morris offered the following:

Resolved—That Consent, permission and authority *is* hereby granted to the Des Moines Street Railroad Company to construct and operate a line of street railway under the provisions of its charter, and of the ordinances of the City of Des Moines, upon and along west Eleventh st.—Northward from the south line of Center street to the north line of School street. Thence westward upon School Street to the west line of Twelfth street, Thence northward on Twelfth street to the north city limits.

Ald. Bolton moved to strike out the words "under the provisions of its charter." Roll Call yeas, Bolton, Drady, & Weitz—3—Nays Chaffee, Conrad, Egan, Macy & Morris—5—Absent King—1—Motion to strike lost—Ald. Morris moved to adopt resolution. Roll Call, Yeas, Chaffee, Conrad, Drady, Egan, Macy, Morris & Weitz—7. Nays Bolton—1—Absent King—1—Approved by the Mayor Nov. 24 86.

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999 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1000 EXHIBIT No. 52. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 255, December 6, 1886.

DES MOINES, IOWA, *December 2d*, 1886.

To the City of Des Moines:

The undersigned company hereby accepts the west route for the laying of a line of its street railway passed and granted by resolu-

tion of the City Council of Des Moines, Iowa, on November 23d, 1886. And said company will build and operate said line on said route as soon as the weather and condition of the streets will permit.

(Sgd.) DES MOINES BROAD GUAGE ST. RY. COMPANY.
"By BAYLIES & BAYLIES,
Its Agents and Attorneys."

Filed December 2d, 1886. Read and placed on record by order of the City Council.

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1001–1011 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

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1012 & 1013 EXHIBIT No. 54. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 15, 1887.

The Broad Guage Street Railroad Company asked to be relieved from running their cars in North Des Moines from 9 o'clock A. M. during the state fair, on account of the scarcity of cars, and desiring to run to the fair grounds, and on motion the request was granted.

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1014 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1015 EXHIBIT No. 55. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Pages 569, 570, 571, 572, & 573, December 19th, 1887.

The Council met at 1:30 P. M. pursuant to the following call by the Mayor. Said call being asked for by the Alderman, viz., Leander, Bolton, M. Drady, & M. H. King, as follows—

To the Hon. J. H. Phillips, Mayor of the City of Des Moines, Iowa:

You are hereby requested to call a meeting of the City Council of the City of Des Moines, Iowa, to be held in the Council Chamber on Monday the 19th day of December, 1887, at the hour of One-thirty P. M. of said day for the purpose of taking into consideration the petition of the Des Moines Broad Guage Street Railroad Com-

pany, asking of said Council a charter to maintain, construct, and operate, a standard or Broad Guage street Railway, *asking of said Council a charter to maintain, construct, and operate a standard or Broad Guage street Railway* of four feet eight and one-h-lf inches on certains streets of said city to be operated by electric or other motor power, and that you cause a notice of said meeting to be served upon each member of the said City Council. Providing for called meeting of said Council and to take into consideration such other & further actions as in the judgment of the said Council may be deemed advisable and necessary for the public good in connection with or in relation to the subject matter of this call.

Witness our hands this 17th day of December, 1887.

(Sgd.) LEANDER,
BOLTON,
M. BRADY, &
M. H. KING,
Members of the City Council of the City of Des Moines, Iowa.

The following order was attached to the above call by the Mayor:

"The city Clerk will call meeting referred to at one-thirty this day.

J. H. PHILLIPS, *Mayor.*

12/19/87.

Roll Call, present—Bolton, Brady, Egan, Sheldon, & Morris (5).

Ald. Bolton, moved that the Council go into the committee of the whole.

Adopted after the presentation of the following petition by the Des Moines Broad Guage Railway Company, viz—

To the Honorable Mayor and City Council of the City of Des Moines, Iowa:

1016 Your petitioner, the Des Moines Broad Guage Street Railway Company respectfully petitions your Honorable Body to grant to it a charter authorizing it to operate its street car lines now laid in the City of Des Moines by electric or other motive power, other than animal power, and to construct and operate by like power, lines of Broad Guage Street Railway, four feet and eight and one-half inches upon other streets and parts of streets heretofore granted your petitioner by ordinances and resolutions, and upon such other streets as in the judgment of the Council the public convenience may require.

Dated December 17, 1887.

(Sgd.) THE DES MOINES BROAD GUAGE ST. RAILWAY COMPANY.
By BAYLIES & BAYLIES, *Its Attorneys.*

On the presentation by Ald. Bolton of preamble and resolution, in relation to the Des Moines Broad Guage Street Railway Company,

the Council went into committee of the whole to consider said Preamble & Resolution.

In due time the committee arose and through its chairman (Ald. Weitz) reported progress and that said committee had struck out the last five lines of the resolution which were as follows:

"Resolved that the Committee on Judiciary submit to this council an ordinance defining the rights, privileges and duties of the City in accordance with the tenor of these resolutions, and for the action of the City Council thereon." and now adopted the following as a substitute therefor, viz—"resolved—that the City Solicitor be and he is hereby directed to prepare an ordinance at once in conformity with the terms and resolutions offered by Ald. Bolton, and submit the same to the Judiciary Committee for their consideration and report forthwith to this City Council."

On motion of Ald. King the foregoing substitute was struck out on roll call as follows—viz—Yeas—Bolton, Brady, Egan, King & Weitz—5—nays—Macy, Sheldon,—2—Absent Baker & Morris, (2).

1017 On motion of Ald. Bolton to adopt the original resolution as amended, the Preamble and Resolution were again read for information as follows:

"Whereas, The City Council of the City of Des Moines on the 29th day of June, 1886, having determined that the street car facilities furnished by the Des Moines Street Railroad Company to the citizens of Des Moines and public generally were entirely insufficient to meet the public wants, necessities, and demands, and determined that the convenience of the public and the best interests of the streets require that another and different system of street railway with Broad Guage four feet eight and one half inch guage tracks should be established and operated on certain streets as the Council should afterwards designate: and

"Whereas on said named date the City Council passed an ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railways in the City of Des Moines and defining the powers and duties of said Company, which ordinance was approved by the Mayor and published July 1st, 1886, and said company the same and give its Bond in writing within the time designated by said ordinance, and

"Whereas said company at once commenced the construction thereof and has built and put into operation with horse cars thereon — miles under the provisions of said ordinance and upon the streets granted by said ordinance and subsequent resolutions which lines so constructed and operated are as follows—

From the East corporation line of west on Grand Avenue to East 9th street. Thence south to Locust and west on Locust to West 4th Street, south on West 4th street to Court Avenue and west on Court Avenue to west 5th street. Also from West 4th & Locust north on 4th & Center to School Street. West on School street to

1018 6th st. and north on 6th st. to the north corporation line where it connects with the extension of said company's lines north to a point near the 6th street bridge—and

Whereas, The public convenience and the good of the streets on which said lines are operated require that an improved street car service be furnished along said routes and along all other streets heretofore granted said Broad Guage Company by ordinance and resolutions, and

Whereas it has been demonstrated that cars operated by animal power have not in the past furnished the convenience that the city and the public needs and requires, and it has been demonstrated since the passage of this ordinance above mentioned that better facilities and accommodations in speed and comfort can be furnished the public by the use of motive power other than animal power or steam power—and

Whereas it has been demonstrated that by reason of the topography of the city, street cars operated by animal power cannot attain an average speed of six miles per hour,

Therefore be it resolved by the City Council of the City of Des Moines That the street car service in this City of Des Moines by animal power upon the Narrow or three feet guage tracks is entirely insufficient in extent, in the number and length of lines on streets on which such service is furnished, in the number of cars used, and the speed that can be made thereon to meet the reasonable demands of the public for street car service—

Resolved that the interest and welfare of the city and the Public require that the Guage of all street Railways now laid or which shall be hereafter laid for the use of cars operated by other than animal power shall be at least four feet eight and one-half inches—Resolved That the accommodation of the public and the welfare of the City and its inhabitants demand that improved motive power other than animal power, and by which power cars can be moved at an average speed of not less than eight miles an hour including
1019 stops for the purpose of taking on and letting off passengers, should be used upon all Broad Guage Street car lines now in operation in this City, and upon all present and future extensions of said lines—And

Whereas the Des Moines Broad Guage Street Railway Company has applied to the City Council for permission to change its motive power from animal power to Electricity or such other motive power as may have been found practical to move its cars at the average speed above mentioned—Therefore—Be it Resolved That consent, permission and authority is hereby granted to the Des Moines Broad Guage Street Railway Company, its successors and assigns to maintain each and all its lines of street railway, turn-outs and sidetracks, and to construct extensions of said lines upon any and all streets and alleys of said City heretofore granted said Company by ordinance or resolution and to operate the same for the term of twenty-five years with electric power or such other practical power other than steam or animal power as will enable said cars to maintain an average speed of not less than eight miles an hour.

Resolved That said company shall be allowed — years in which to change from animal power to such other powers as it may select.

On motion the foregoing Preambles & Resolutions was adopted

on roll call as follows—Yeas: Bolton, Drady, Egan, King & Weitz—5—Nays Macy & Sheldon—2—Absent, Baker & Morris—2. Approved December 19, 1887.

(Sgd.) J. H. PHILLIPS, *Mayor.*

An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct, maintain and operate by Electric or other motive power other than animal or steam power (on any street) railroads in the City of Des Moines, and defining the
1020 powers and duties of said company"—was read a 1st time.

On motion of Ald. King the rule requiring 3 separate readings on 3 different days was suspended on roll call as follows Yeas: Bolton, Drady, Egan, King, Macy, Sheldon & Weitz—7—Nays none Absent Baker & Morris—2—The ordinance was then read a 2d time and laid over under the rule—

Ald. King offered the following resolution—Resolved That the Mayor be and he is hereby requested to call a special meeting of the City Council of the City of Des Moines, Iowa on Tuesday the 20th day of September 1887, at the hour of 2 P. M. said meeting to be held in the Council Chamber of said City for the purpose of taking into consideration the 3d reading of a bill for an ordinance granting to the Des Moines Broad Guage Street Railway Company a charter to maintain and operate a street railway by electric or other motive power upon certain streets & alleys of this City, and to consider such amendments as in the Judgment of the City Council may be deemed advisable and necessary for the interests of the citizens and people of this City in connection with the final passage of said ordinance as provided by law.

On motion the foregoing resolution was passed on Roll Call as follows—Yeas—Bolton, Drady, Egan, King, Sheldon & Weitz—6—Nays Macy—1—Absent Baker & Morris (2).

Approved by the Mayor.

A call for a special meeting for Tuesday Dec. 20th at 2 P. M. was immediately issued by the Mayor and due & legal service of notice of same was acknowledged by the following aldermen then present viz—Bolton, Drady, Weitz, Sheldon, King Egan & Macy—7.

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1021 (Endorsed.) Filed Sep. 15. 1906. E. R. Mason, Clerk.

1022 EXHIBIT No. 56. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 575, December 20th, 1887.

The Council met pursuant to the following call of the Mayor:

DECEMBER 19*th*, 1887.

To W. D. Christy, Es*t*., City Clerk of the City of Des Moines:

SIR: Please call a special meeting to-morrow, Dec. 20th, 1887, at 2 o'clock P. M. of said day, to consider an ordinance this day considered by said City touching the granting to the Des Moines Broad Guage Street Railway to use Electric or other mot*or* power, except animal or steam power, in operating a line of Street Railway in said City, and any amendments thereto and all matters concerning said Street Railway.

(Sgd.) J. H. PHILLIPS, *Mayor*.

On roll call the following members were present—Drady, Egan King, Macy, Sheldon & Weitz—6—

"The ordinance authorizing the Des Moi*n*es Broad Guage Street Railway Company to construct, maintain, and operate by Electric or other motive power, other than animal or steam power on any street Railroad in the City of Des Moines, and defining the powers and duties of said Company"—The ordinance being on its 2d reading after matured deliberation thereon, a number of amendments were made and section 23 was added. The ordinance was then read a 3d time and placed upon its final passage, and on the question shall the ordinance now pass the yeas were Baker, Bolton, Drady, Egan, King, Morris, Sheldon & Weitz—8—Nays, Macy—1—So the ordinance was passed and the title agreed to"—

The foregoing ordinance was referred to the Mayor for his approval—And on the 24th day of December 1887, The Mayor filed in the Clerk's office the foregoing ordinance with his approval of the same, And with it the following opinion of the City Solicitor—viz—

"DES MOINES, IOWA, *Dec*. 23/87.

Hon. J. H. Phillips, City:

DEAR SIR: Referring to yours of the 21st inst., relative to the ordinance granting the Des Moines Broad Guage Street Railway the right to operate its road in this city by means other than animal power.

1023 The question you submit is—Does the Ordinance in any manner conflict with the decree entered by the Supreme Court in the case of the Des Moines Street Railroad *vs*. the City *et al*.

In answer to the above question allow me to say that I am of the

opinion that the ordinance is not in conflict with the decree mentioned.

The decree affirmatively provides that the Des Moines Street Railroad Company has the exclusive right to operate its road by animal power upon all the streets of the city, the decree being silent as to any other power.

There may be a question made to as to the validity of the ordinance, but as the record now stands I cannot see wherein the ordinance conflicts with the decree.

I herewith return to you the sections of the ordinance enclosed in your letter.

Very truly,

(Sgd.) JAMES H. DEITRICK,
City Solicitor.

The following is the decree referred to in the Solicitor's report to the Mayor—and was by the Solicitor presented to the Council in the following words:

"To the Honorable Mayor and the City Council.

GENTLEMEN: I herewith submit a copy of the decree in Des Moines Street Railroad Company *vs.* the City of Des Moines, *et al:* And suggest that the same be entered upon the records of the City.

Respectfully,

JAMES H. DEITRICK,
City Solicitor.

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1024 (Endorsed:) Filed Sep. 15, 1905. E. R. Mason, Clerk.

1025 EXHIBIT No. 57. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct, maintain, and operate by electric or other motive power, other than animal or steam power, on any street, street railroads in the City of Des Moines, and defining the powers and duties of said company.

0399 P., December 20, 1887.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That consent, permission and authority is hereby given and granted to and vested in the Des Moines Broad Guage Street Railway Company, and its successors and assigns, to construct, maintain, and equip and operate for the term of twenty-five years, upon the conditions hereinafter stated, with electric or other practical *motor*

power, other than animal or steam power, on any street, single or double standard or broad gauge street railway tracks, four feet eight and one-half inches wide, along and over the streets, alleys, viaducts and bridges of an within the City of Des Moines, hereinafter designated; and such other streets and alleys as said company may hereafter select with the consent and approval of the said city; and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs sidetracks and switches, and all necessary and convenient apparatus and appliances required for the proper use of such motive power to enable said company to comply with the requirements of this ordinance; and upon such alleys only fronting on which said company shall have depots, car barns or electric or other machinery? And in constructing, maintaining and operating said railway, said company shall have the right to intersect and cross the tracks of any street or other railway company.

SEC. 2. Consent, permission and authority is hereby given and granted to the Des Moines Broad Guage Street Railway Company its its successors and assigns, to maintain as now constructed, subject to the provisions of this ordinance, all tracks of its railway as
1026 now laid in the City of Des Moines and is granted permission and authority to itself, its successors and assigns, to equip and operate its cars upon said lines of street railway with electric or other motive power, other than animal or steam power, on any street, but such equipment and operation shall be subject to the provisions of this ordinance.

SEC. 3. The streets and parts of streets herein specifically referred to are as follows:

Commencing at the east corporation line of Grand avenue running west on said avenue to East Ninth street, thence south on Ninth street to Locust thence west on Locust street to West Fourth street, thence south on said Fourth street to Court avenue, thence west on Court avenue to West Fifth street, thence north on West Fifth street to Mulberry street, thence west on Mulberry to Seventh street, thence north on Seventh street to Walnut street, thence west *east* on Walnut street to Twelfth street, thence north on Twelfth street to Grand Avenue, thence west on Grand Avenue on the north side of the center of the avenue to Fifteenth street, thence north on Fifteenth street to Linden street, thence west on Linden street to Sixteenth street, thence north on Sixteenth street to High street, thence west on High street to Seventeenth street, thence north on Seventeenth street to Center street, thence west on Center street to Eighteenth street, thence north on Eighteenth street to Crocker street, thence west on Crocker street to Cottage Grove avenue, thence along Cottage Grove avenue to Twenty-first street, thence north on Twenty-first street to Atkins street, thence west on Atkins street to Twenty-fourth street, thence north on Twenty-fourth street to North street, Thence west on North street to Drake University.

Also north on West Fourth street from Locust to Center St., thence west on Center to Fourth street, thence north on Fourth to School street, thence west on School to Sixth avenue, thence north on Sixth

avenue to the north corporation line of said city; but on
1027 West Fourth street, between Locust and Center streets, there shall not be laid to exceed one track, and one switch between Court avenue and Center street not exceeding 120 feet in length.

Also north on East Fifth street from Locust street to Grand avenue, thence east on Grand avenue from Fifth to Sixth street, thence North on Sixth street from Grand avenue to Maple street, thence east on Maple street from Sixth street to Pennsylvania avenue, thence north on Pennsylvania avenue from Maple street to Filmore street, thence east on Filmore street to Ninth street, thence north on Ninth street from Filmore street to the north corporation line of said city.

Also all other streets or parts of streets heretofore granted to said railway company by ordinance or resolutions of the City council of said city; provided, this grant shall not be held to authorize the laying of more than one track and the necessary turnouts and switches along any street upon and along which there shall be at the time of laying such single track another line of parallel street railroad constructed and in actual operation under and in accordance with the ordinances of said city.

SEC. 4. The cars to be used upon such tracks shall be the best style and class used in other first class cities of the country and shall be operated by electric or other practical motive power only, and not by animal or steam power on any street. The tracks shall not connect with any railway on which animal or steam power is used, and no railway car or carriage used upon any railway operated by animal or steam power shall be used upon any of said tracks; and said cars and tracks shall be used for the purpose of transporting passengers and their baggage only. Provided, said company shall at all times have the right to use said tracks for transporting materials to be used by it in constructing repairing and operating its road, and may also haul the cars used by it upon its extensions outside of the city limits into *the* through the city, and the street cars used by other companies within the city of the same *guage*
1028 as the cars of said company.

SEC. 5. In the construction of its track a tram rail only shall be used, the width of which shall be five inches from the outside to outside; the width of the tram shall be three inches horizontal; the height along the wagon edge, or from the rim to the highest part of the rail, shall not be *more* than seven-eighths of an inch.

SEC. 6. The track shall be laid so as to conform to the established grade of any street on which the road may be built, whenever the city has or hereafter shall establish such grade. When the streets are not graded, said company may lay its tracks so as to conform to the surface of such streets, but the same shall be made to conform to such grade whenever the city shall grade such streets, or any part thereof, and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run, said company shall at its own expense pave or otherwise improve the space between the rails of their track so that it shall

substantially correspond with the improvement of the street outside of the rails and track.

SEC. 7. The said city of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breaking of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or for the improvement or repairs of any street, unless there be unreasonable delay in making such repairs.

SEC. 8. Upon all streets and alleys where said company is granted a permission to lay its tracks, along which no other parallel railroad track is laid, the tracks of said company shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in such case the tracks may be laid at such distance from the center of the
1029 streets as will make the center point between the two tracks the center of the street, and there shall be no greater space between the tracks than reasonably necessary for cars to pass, and said tracks shall not be laid within twelve feet of the curb-line unless permission be first obtained from the City Council, upon any street in any case where it is practicable to be avoided, and where any line of railway along and upon any such alleys, as provided for in section one, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alleys; provided, however, that if said company shall have its depot, stations, stables, or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-outs tracks from such alleys into such depots, stations, stables or car houses.

SEC. 9. In all cases where said company shall desire to construct a line of street railway parallel to the line of any other street railway previously laid, and being used on such street or streets, said company may lay its tracks as near the center of the street as practicable, without interfering with the practical operation of the line of railroad then in operation along such street.

SEC. 10. The rate of fare shall not exceed five cents for each passenger on any one route of the company, from the extreme north end to the extreme south end of said line, and from the extreme east end to the extreme west end of the routes herein granted.

SEC. 11. The cars of said company shall be entitled to the track, in all cases when a team or vehicle shall be met or overtaken upon any of the street railways in said city, of this company, such team or vehicle shall give way to such car; nor shall any person willfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopping any team, or vehicle in,
1030 upon, along, across or near the track of said railway, after being notified by the driver or conductor, by the ringing of the car bell or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before

the Police Judge of this city, be fined in any sum not less than five dollars, nor more than fifty dollars.

SEC. 12. This charter is granted upon, and the rights and privileges herein conferred are subject to, the following conditions, to-wit:—

SEC. 13. In the construction of their railway upon all bridges and viaducts over which the same may run, the company shall so construct the same that the top surface of the rails shall be on a level with the surface of the floor of the bridge, or viaduct, and on all paved streets the top surface of the rail shall be on a level with the surface of the pavement.

SEC. 14. The cars or carriages of said company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

First. No car shall be run upon a greater average rate of speed, including stoppages to take on and let off passengers, than eight miles an hour in the business part of the city and twelve miles an hour in the residence portions thereof, nor less than an average of five miles an hour in the business portion of the city and eight miles an hour in the residence portions thereof.

Second. While cars are turning corners from one street to another they shall not be moved to exceed five miles an hour.

Third. Cars moving in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity, accident or when near stations, unless attached and propelled together.

Fourth. No car shall be left standing upon the street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor
1031 in front of any intersecting street, except to prevent collision, or to avoid danger to persons in the streets, or to take on or to put off passengers.

Sixth. The conductors and drivers employed by said company shall use all reasonable diligence and care to prevent injury to persons and upon the appearance of danger to any one on or near the tracks, the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons or other vehicles, and persons.

Eighth. The conductors shall use proper diligence to prevent ladies or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers in a distinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any railway company, other than a street railway company.

Tenth. No car shall remain standing at any of the stations more than ten minutes, except at each end of the lines, and at stations nearest the passenger depots of other railway companies;

at which accepted stations they may stand a longer time; and the cars after sunset shall be provided with lights and signal lights.

Eleventh. Cars shall start from both ends of any line as early as six o'clock A. M. and run continuously as late as twelve o'clock midnight, from six to nine o'clock A. M. and from nine o'clock P. M. to midnight cars shall run at intervals of not more than ten minutes from nine o'clock A. M. until nine o'clock P. M. cars shall run at intervals of not more than five minutes.

SEC. 15. Whenever the City Council shall by ordinance grant to any other street railway company the right to lay its tracks along and upon any street, upon which this company shall have laid its track or tracks, and shall then be operating its line, the City Council may by resolution require the said Des Moines Broad Guage Railway Company and its successors and assigns, at the expense of such other street railway company, to move its track (if but one) to one side of the center of the street, so that the new track may be so laid that the center of the street shall be the center of the space between the said tracks, if said company shall have two tracks on such street, then they shall be so moved as to permit the laying of the new track in such position that the space between the sidewalks and the track on each side of the street shall be equal. Should the said company fail or refuse to move its track or tracks, as above provided, when notified so to do by resolution of the City Council, the City Council may cause the said track or tracks to be moved at the expense of said company.

SEC. 16. Whenever another street railway company duly authorized by the City Council, shall desire to operate its line for a distance of not more than two blocks, along and upon any street upon which the said Des Moines Broad Guage Street Railway Company shall have laid its track and shall then be operating its line, the City Council may require such new company to run its cars upon and along the said track or tracks for said distance, and the said Des Moines Broad Guage Street Railway Company shall grant such other company the right to use its track or tracks for said distance upon payment by such other company of a reasonable compensation, to be agreed upon by the said companies, if possible; but if the said companies cannot agree then the compensation shall be fixed by three persons, one to be chosen by each company, and the two to choose a third; provided, such other company shall not use such track or tracks so as to interfere with or unnecessarily obstruct the operation of the cars of the company owning such line, according to their schedule time of running their cars thereon.

SEC. 17. A failure to use any track or tracks, and run cars thereon, on any street or part of a street, as provided in rule eleven of this ordinance, for a period of thirty days, unless unavoidably prevented or pending litigation involving the right of said company to operate its road, shall be deemed an abandonment of such street or part of street by said company and the City Council may by resolution declare such — or part of street abandoned, and require said company to remove its tracks from any such street or

part of street, and upon failure or refusal of the said company to so remove its tracks, when notified so to do, the City Council may cause the same to be removed at the expense of said Company.

SEC. 18. The said company shall commence operating at least one car on its line by electric or other motive power, except animal and steam power, on the streets within twelve months after its acceptance of this ordinance, and shall have at least six cars so operating within two years from such acceptance, and operate the same thereafter upon the schedule time prescribed by rule eleven of this ordinance; and, provided, that in case said company shall be prevented from complying with the provisions of this section, by litigation in any court of justice, the time thus prevented shall not be counted against the aforesaid Des Moines Broad Guage Street Railway Company, but shall be regarded as an extension of time in favor of the last named street railway company, its successors or assigns.

SEC. 19. The City Council reserves the right to adopt such other reasonable rules and regulations from time to time and to compel compliance therewith.

SEC. 20. In any litigation arising out of the grant herein given the city shall not be liable for any costs or damages growing out of such litigation.

1034 SEC. 21. After the expiration of ten years from the passage of this ordinance the said company shall pay annually to the city five per cent. of its net earnings as consideration for the rights and privileges herein granted, but nothing herein shall be construed as exempting said company from taxation the same as other property subject to taxation.

SEC. 22. Within thirty days after the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grant above made with the condition, regulations and limitations above expressed signed by the President and Secretary of said company, and upon failure to file such acceptance as aforesaid; then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

SEC. 23. Nothing in this grant contained shall be construed as an interference on the part of the Council with the exclusive right of the Des Moines Street Railway Company to construct and operate by animal power street railways upon the streets of Des Moines, under such reasonable police and equitable control as may be prescribed by the Council and in accordance with the decree of the Supreme Court of Iowa, entered December 20, 1887, in the case of said company against the city of Des Moines, the City Council having by resolution adopted December 19, 1887, determined that the lines of the Des Moines Street Railway Company, now constructed or that may be constructed or extended hereafter and operated by animal power do not furnish and will not furnish upon the streets designated in this ordinance, or to the public, such street car service as is reasonably required by said city on said street.

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1035 (Endorsed:) Filed Sep. 15, 1905. E. R. Mason, Clerk.

1036 EXHIBIT No. 58. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book M, Page 583, January 2d, 1888.

The acceptance of the ordinance passed December 20, 1887, in relation to the Broad Guage Street Railway Company by said company, and filed at the office of the city clerk on the 30th day of December 1887, was taken up and read as follows:

"DES MOINES, IOWA, *December* 28, *A. D.* 1887."

To the City of Des Moines, Iowa, the Mayor and Council thereof:

You are hereby notified that the undersigned, the Des Moines Broad Guage Street Railway Company, accepts the ordinance of said city of Des Moines, passed December 20th, 1887, attested by the clerk and approved by the mayor, and published December 24, A. D. 1887.

Said ordinance being entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct, maintain and operate by electric or other motive power, other than animal or steam power, on any street railroads in the city of Des Moines, and defining the powers and duties of said company," and this acceptance of said ordinance and the grant therein contained is upon the conditions, regulation and limitations therein expressed."

(Signed) "THE DES MOINES BROAD GUAGE ST. RY. CO.,"
By G. VAN GINKEL, *Pres., and*
H. E. TEACHOUT, *Sec'y.*

On motion the foregoing acceptance was received and ordered spread on the records of the city.

* * * * * * * *

1037 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1038 EXHIBIT No. 59. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance entitled an ordinance to regulate and control the laying and constructing of street car tracks over, across, and upon the streets, alleys, and bridges of the town of North Des Moines, Ia.

SECTION 1. Be it ordained by the town council of the town of North Des Moines, Iowa, that no street car track shall hereafter be

laid upon, over or across any of the streets, alleys or bridges
said town, unless permission so to lay the same over, upon or acr
the particular street, alley or bridge, or each particular street, all
or bridge shall have first been granted to the party or corporati
desiring to lay the same, by an ordinance of said council. T
word "Track" as used in this ordinance shall designate and inclu
any and all tracks laid for street car purposes, whether designat
and intended to be used as a track, side track, turnout, switch or Y.

SECTION 2. The said ordinance when ordained shall specifica
designate the particular street or streets, alley or alleys, bridge
bridges, over, across and upon which said tracks shall be laid. T
particular portion of or place *or* each particular street, alley
bridge upon, over or across which the said track shall be la
The gu*a*ge or width — shall be constructed. The kind quality, a
dimension of rail that shall be used in the construction there
The elevation at which said rail shall be placed above roadwa
The material of which and the manner in which the bed for s
track shall be constructed.

SECTION 3. That all street car tracks hereafter constructed up
over or across any of these streets, alleys or bridges of said to
shall be constructed in all respects as provided in the ordinan
particularly authorizing the construction of said track and
strict compliance with all the terms, provisions and conditi
thereof.

1039 & 1040 SECTION 4. That any street car tracks that sh
be hereafter laid upon, over or across any of t
streets, alleys or bridges of said town which does not in all respe
strictly conform to the terms, provisions and conditions of this
dinance, and of the special ordinance particularly authorizing t
construction of the same, is hereby declared a nuisance, and it
hereby made the duty of any peace officer of said town, to abate s
nuisance by immediately tearing up and removing said track fr
said street alley or bridge, at the cost of the party *of* corporation l
ing or attempting to lay the same, said cost to be recovered the
from in a civil action.

SECTION 5. That the laying or attempting to lay any street
track, side track, turnout, switch or Y in violation of any of t
terms, conditions or provisions of this ordinance is hereby decla
a misdemeanor.

SECTION 6. That any person or corporation convicted of viol
ing or attempting to violate any provision of this ordinance shall
punished by a fine of not to exceed $100.00 or imprisonment in t
County jail of Polk County, Iowa, for a period of not to exc
thirty days.

SECTION 7. All ordinances or parts of ordinances inconsistent
in conflict with the provisions hereof are hereby repealed.

Adopted April 30, 1888.

(Signed) J. B. LOUGHRAN, *Mayor.*
JOHN McVICAR, *Recorder.*

I hereby certify that this ordinance was posted May 1st, one copy at mayor's residence, one at the corner of Ninth and North streets and one at the corner of Sixth street and Forest avenue.

(Signed) J. B. LOUGHRAN, *Mayor.*
JOHN McVICAR, *Recorder.*

Page 3 of ordinance record.

* * * * * * *

1041 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1042 EXHIBIT No. 60. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 83, May 24th, 1888.

Ald. Bolton offered the following resolution in relation to the Des Moines Street Railway Company viz:

Resolved by the City Council of the City of Des Moines, That we find and determine the following facts—

1st. That at the time of the passage and acceptance by the Des Moines Street Railway Company of the contract with said Company by the City Council of the City of Des Moines of Dec. 10th, 1886—that the *guage* of Street Railway tracks in common use in other cities was not less than four feet eight and a half inches. That such was the uniform *guage* of all street railways at that time—That by laying Street Railway tracks of the proper form such Railway tracks are not an obstruction to the free use of the streets. But rather a new and improved method of using the same, germain to their principal object, as a passageway ma-king the progress of civilization in this age, and to which the genius of the law readily accommodates itself, since such tracks being of the same width of the ordinary road wagon, increased the facility of the use of streets whereon they were laid, for heavily loaded and other vehicles. That upon the laying of the first tracks by said company upon the streets they were laid according to the said *guage*, and that it was the duty of said company under said contract to lay and maintain its tracks at that *guage*, upon properly constructed or flat iron railroad tracks but said Company afterwards in violation of the implied obligations of its contract, narrowed said *guage* without authority from the City of Des Moines to 3 feet, and has since maintained its tracks at that *guage*—And that said narrow *guage* with the character of rails used and the manner in which they are laid and maintained in each and all of said respects is an obstruction and dangerous to public travel on the streets and renders the City liable to damage for defects in its streets created thereby—

1043 That by the use of said *guage* the horses of said company when driven abreast and of double teams driven along said tracks, are necessarily driven along the outside edge of the said

tracks thereby wearing the pavement along such tracks and bringing the tracks largely above the surface of the streets— That the rail used by said company has a Tram so narrow that when the top surface of the rail is laid level with the pavement the space between the wagon edge, and the pavement between the tracks is to- narrow for the trackage of most vehicles without cramping the wheels, rendering it dangerous to such vehicles in getting off said tracks— The width between the tracks or the gauge thereof, is so narrow and the rail used of such an unsuitable pattern as that the track of said railway, and the whole width thereof, is practically used exclusively by the Railway Company, and ordinary vehicles are practically inhibited to use—

That the rails of said company constitute an actual and unreasonable obstruction upon the street, and are a positive nuisance in the use of such streets by ordinary vehicles—

2nd. That the Des Moines Street Railroad Company, the successor of the Des Moines Street Railway Company has positively and continually violated its original contract with the city in the following particulars.

At no time has it laid or maintained its track upon any bridge in this city with the top surface of the rail level with the floors of such bridges, but has laid and maintained the same entirely above the floor of the bridges in express violation of its contract.

It has also laid and maintained its tracks in many cases above the pavement and established grade of the streets; and above the surface of the streets where grades are not established contrary to its contracts, thereby rendering the streets dangerous for public travel, and its tracks a nuisance thereof.

1044 It has persistently ignored the reasonable requirements of the City as made by the ordinance of September 14th, 1886, in the following particulars.

It has constantly failed to operate its cars commencing at 6 o'clock A. M. and running until 12 o'clock midnight, as required by said ordinance.

It has failed to run its cars upon its line from 6 A. M. to 9 o'clock P. M. or from 9 o'clock P. M. to midnight at intervals not greater than 15 minutes apart, as required by said ordinance, but during said hours it has started its first car from the northwest and west end of its line about 6 o'clock A. M.—and its next car and the one after that at intervals of from one-half to one hour apart.

And in the evening has begun uniformally to take its cars off as early as 10 o'clock P. M. and has usually taken its last car off the track not later than 11:30 P. M. and it has been generally impossible for persons in the business centers of the city going East to obtain a car after 10:30 P. M. or to obtain but a single car going northwest or north in the morning before 8 o'clock or 8:30 A. M. That said Company has at all times failed to drive its horses between its rails upon the pavement paid for by the Company as required by said ordinance but has continually caused the same to be driven on the outside of its rails upon pavement paid for by the abutting prop-

erty owners to the injury of the City and said owners in violation of said ordinance.

It has at all times failed to drive its horses and cars on a Schedule time of six miles an hour as required by said Ordinance of Sept. 14th, 1886.

And it has not driven upon a schedule of time exceeding five miles an hour, and its actual time made is never in excess of five miles an hour and often not to exceed three of four miles an hour.

1045 It has failed to respect or obey the Ordinance of the City with reference to removal of pavement and has removed pavement before the same was appraised under said Ordinance or paid for by said Company and has undertaken to lay tracks upon parts of streets previously unoccupied by it and to lay its tracks at points in streets not previously designated by the City Engineer and has laid tracks upon streets which it has never used and has failed to make its annual statement of its net receipts as provided by Ordinance.

We find in consideration of the foregoing facts that the Des Moines Street Railroad Company has failed to comply with its contract with the City of Des Moines of date Dec. 10th, 1866, and all subsequent amendmenets thereto and that all its rights and privileges thereunder are subject to revision and forfeiture on the part of the city.

We find that further extensions of said street railway and its construction and operation upon any part or parts of the streets of said City not heretofore occupied by its tracks would be an injury to such streets and parts of streets and to the City, would be a damage to the abutting property owners on such streets and an inconvenience and obstruction to public travel, and a nuisance in such streets.

Therefore: Be it further Resolved by the City Council of the City of Des Moines—

That the Des Moines Street Railway Company and its successors the Des Moines Street Railroad Company has by its repeated violations of the expressed and implied obligation of its contract with the City of Des Moines, of Dec. 10th, 1866, and subsequent amendments thereto in the particulars above stated and its repeated violations of the reasonable police regulations imposed upon it by the Ordinances of the City of Des Moines heretofore named in the particulars above specified, forfeited its rights and privileges under said contract and released the City of Des Moines from its obligations under said contract.

1046 Resolved further that the rights and privileges and exclusive right of the Des Moines Street Railroad Company under its contract with the city of Des Moines to construct and operate street railroads by animal power upon all streets and upon all parts of streets in said City be and the same are hereby declared forfeited by the wrongful acts and misconduct of said Company as hereinbefore stated, as well as for other acts and omissions not herein enumerated. And the City shall and does hereby renounce and rescind said contract and resumes all its original rights in and

on each and all said streets and parts of streets used or occupied by said Railroad Company to the same extent as though said contract with said Company had never been made.

Resolved: That the City Solicitor or such other attorney or attorneys as the City Council may select, be and they are hereby directed to bring and prosecute any and all such actions as may be necessary to enforce the forfeiture declared in these resolutions—

Resolved That the Des Moines Street Railway Company is hereby forbidden and prohibited from hereafter conducting and operating any street railway upon any street or part of streets of said *company* where said Company has not at this time a line of Street Railroad in actual operation.

And it is hereby prohibited from constructing or laying down, any further Railroad or tracks upon any street or part of street in the City until the forfeiture herein declared shall be determined by the Courts—

And it is made the duty of the Mayor to have a copy of this resolution served upon said company, and to enforce these Resolutions.

On motion the foregoing resolutions were adopted on Roll Call as follows: Yeas, Baker, Bolton, Drady, Egan, & Weitz—5—

1047 Nays none—Absent King, Morris & Sheldon—4—

Approved May 24th, 1888.

(Sgd.) WM. L. CARPENTER, *Mayor.*

(Copy served as follows:)

Received and served this resolution on F. A. Sherman, Sec. of the Des Moines Street Ry. Company—May 25, 1888, by delivering to them a copy of the same.

ALFRED JARVIS,
City Marshal.

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1048 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1049 EXHIBIT No. 61. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book X, Page 90, May 29, 1888.

Council met pursuant to a call made to consider street railway resolutions—ordinances and petitions—his honor the Mayor in the chair—roll call present Baker, Bolton, Drady, Egan, Macy & Weitz—"An ordinance authorizing the maintenance and operation of a street railroad by the Des Moines Street Railroad Company in, upon and along certain streets in the City of Des Moines," Providing penalties for a violation thereof, and to repeal an ordinance entitled "An ordinance authorizing the construction and operation of certain

street Railroads in and along the streets of the City of Des Moines," passed December 10th, 1866, and Amendments thereto passed February 5th, 1872, and to repeal an ordinance passed Sept. 14th, 1886, entitled an ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines adopted December 10th, 1866, and Amendments thereto passed February 5th, 1872."

Was read a 1st time and laid over under the rule.

Ald. Bolton offered the following resolution, Whereas a grave emergency has arisen respecting the street railway service of the City of Des Moines and the measure of control possessed by the City Council over the streets and respecting its rights to prescribe where, when and how street railway tracks shall be laid down and the manner in which the business shall be conducted, it has become a public necessity to investigate the relations which the Des Moines Street Railroad Company as the successor of the Des Moines Street Railway Company bears to the City under existing ordinances of this Council.

1050 1st. The Council finds that the original ordinance granting the Des Moines Street Railway Company the right to construct and operate its lines of railway upon the streets of Des Moines was passed December 10, 1866, and an amendment thereto February 5th, 1872.

That by an ordinance passed September 14th, 1886, the first named ordinance and its amendments were repealed and said Company granted certain rights and privileges not necessary to enumerate here.

2d. The Council further finds that said Railway Company and its successor have not only openly and publicly repudiated the ordinance of 1886, but have failed to conform thereto in many substantial and reasonable particulars and have continuously claimed and now claims that said ordinance was void and of no effect and that the said ordinance of 1866 with its amendments was and is in full force and obligation.

3d. The City Council without admitting the invalidity of the ordinance of 1886 or recognizing the pretended rights of said company under said original ordinance has examined the construction of the line of railway and the long continued conduct of the company and its successor and compared the same with the requirements of said last mentioned ordinance and amendments, and thereupon finds that the said company and its successors have failed neglected and refused to perform the conditions thereof or to comply with reasonable requirements therein prescribed in many respects among which are "A" They have not constructed their railway upon the bridges used by them as required by section (9) of said ordinance.

"B." They have maintained and now maintain their tracks upon the paved streets above the surface of the same so as to greatly impede and obstruct public travel.

"C." They have maintained and now maintain their tracks upon

streets not paved above the established grade so as to greatly
1051 impede and obstruct public travel.

"D." They have failed, neglected and refused to provide and use cars and carriages of the best style and class used on such railways in other cities—

"E." They have neglected and refused to run their cars at the speed or times reasonably required for the public convenience and good—

"F." They have laid down tracks upon public streets without the consent of the City Council and without an intention of good faith to use the same but for the mere purpose of securing possession of such streets—

"G." They have laid down their tracks upon many streets and used the same when such occupation and use were wholly unnecessary for the reasonable operation of the railway or the accommodation of the public whereby public travel has been greatly impeded and obstructed—

"H." They have, against the express ordinance of the City and the direction of its Officers defaced and injured bridges, and excavated and torn up streets and pavements in the unauthorized construction of railway tracks, to the great damage and inconvenience of the public.

"I." They have failed, neglected and refused to lay their tracks as provided in section six (6) of said ordinance of 1866.

"J." They have failed to make annual statements of net receipts and to pay taxes thereon as provided by said ordinance—

4th. The Council further finds that by reason of the aforesaid violations of the said ordinance and their duties imposed thereby on the part of the Des Moines Street Railway Company and its successor, the said Des Moines Street *Railway* Company, the said last named Company has forfeited all rights, privileges and franchises granted by said ordinance and amendments, and that the City has the right to annul the contract arising therefrom and repeal the
1052 same, and that the public good requires that said contract be forfeited and annulled, and the ordinance and amendments repealed if the same be now in force and effect—

"5." The Council further finds that it would be unequitable and unjust, notwithstanding such repeated violations to deprive the said Railroad company of the use of the streets so far as they are reasonably necessary to enable said Company to operate the system now being operated by it, and to utilize all the property connected therewith. That therefore an ordinance should be passed granting such franchise to said company, its successors and assigns, and that the resolutions hereto appended should not be operative until the passage and approval of an ordinance having such object in view—

Therefore, Be it resolved by the City Council of the City of Des Moines—

That all the rights and privileges of the Des Moines Street Railway Company or of its successor, the Des Moines Street Railroad Company granted or confirmed by the said ordinances of December

10th, 1886, and its amendments or by the ordinance of September 14th, 1886, are hereby forfeited and declared to cease and determine, and that the contract created by said ordinances and each of them be and the same is forever annulled and cancelled—This Resolution shall take effect upon the passage of an ordinance having for its object and purpose the granting of the right to the Des Moines Street Railway Company, its successors and assigns to use such streets as are reasonably necessary for the operation of its present system of service under such reasonable regulations as may be prescribed—

Be it further Resolved that in the event of a failure of said Railway Company to accept the ordinance last mentioned if it shall be passed and approved within the time therein specified, the City Solicitor is hereby authorized to institute such proceedings as he may determine to be necessary to give effect to and enforce the
1053 forfeiture herein declared, and he is further empowered to employ such additional Counsel as he shall deem expedient. Be it further Resolved that the Mayor be instructed to cause a certified copy of these resolutions to be served upon the said Des Moines Street Railroad Company within three days after their adoption & approval.

On motion the foregoing Resolution was adopted on roll call as follows: Yeas: Baker, Bolton, Brady, Egan & Weitz 5—Nays—Macy,—1—Absent King, Morris, Sheldon—3

Approoved May 29th, 1888.

(Sgd.) WM. L. CARPENTER, *Mayor.*

A true copy of these resolutions was served on the Des Moines St. Railroad Co. on the 1st day of June, 1888.

By P. BURNS,
Deputy City Marshal.

* * * * * * * *

1054 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk

1055 EXHIBIT No. 62. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the maintenance and operation of a street railroad by the Des Moines Street Railroad Company, in, upon, and along certain streets of the City of Des Moines, providing penalties for violation thereof; and to repeal an ordinance entitled "An ordinance authorizing the construction of certain street railroads in and along the streets of the City of Des Moines," passed December 10, 1866, and amendments thereto, passed February 5, 1872; and to repeal an ordinance passed September 14, 1885, entitled "An ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, adopted December 10, 1866, and amendments thereto, passed February 5, 1872."

O. 128. P. June 1, 1888.

SECTION 1. That consent, permission and authority *is* hereby given and granted to and duly vested in the Des Moines Street Railroad Company, its successors and assigns, to maintain and operate a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon and along so much of the street- or parts of streets of the City of Des Moines as are now occupied by the tracks of said Railroad company in actual use, except as hereinafter provided, and upon such alleys only fronting on which said company has depots, stables or car houses, and upon no other streets or alleys, unless upon written application to the City Council as herein provided, the right to use and occupy other streets and alleys shall be hereafter granted; and authority is hereby given said company, its successors and assigns to keep, maintain, use and operate its railway cars, in the manner, for the time and upon the conditions herein mentioned and prescribed, and upon such other conditions and upon such further reasonable regulations as the City Council may hereafter prescribe.

SEC. 2. The City Engineer shall, within five days after the passage of this ordinance, make a survey of the tracks now owned and operated by said railroad company and file in the office of the City
1056 Clerk a plat or map duly certified showing what streets or parts of streets are, at the time of the passage of this ordinance, being actually used by said railroad company in the operation of its street railroad.

SEC. 3. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks, unless the right to do so be hereafter granted by ordinance.

SEC. 4. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities. Provided, said company shall at all times have the right to use its track for transporting iron, ties and other material for maintaining its road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may hereafter be entered into by and between the city of Des Moines and said company.

SEC. 5. The tracks of said railroad shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may have established such grades, where the streets are not at the established grade, said company must, until they are so graded, maintain its track so as to conform to the surface of such streets. Provided, that it shall raise or lower the same to grade whenever the city shall grade said streets or any part thereof; and in case said city shall at any time pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve and maintain a space three and one-half feet in width on each side of the center of its track so that it shall substantially correspond with the paving or improvement of the remainder of the
1057 street? Provided said company shall plank the space between the tracks at each principal street crossing, and shall, where its crossings are laid upon paved streets, make the top surface of its rails level with the surface of the adjacent pavement, and shall in crossing bridges make the top surface of its rails level with the floor of such bridges. And during the course of the improvement of any street, whether by grading, sewering or paving, said company shall move and adjust its track so as not to interfere with the performance of such work.

SEC. 6. The said city of Des Moines shall not be liable to said company for any damage that may be occasioned by the breaking of any gas or water pipe, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement of any street, unless there be unreasonable delay in making such repairs.

SEC. 7. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, except where a double track is contemplated or where some other company is or shall hereafter be authorized to lay a track on the same street, in either of which last named cases the track shall be laid at such distance from the center of the street that the center of the street shall be an equal distance from the nearest rail of each of the two lines of the road, and the distance from the center of the street to the nearest rail shall be fixed by the City Engineer. And provided further, that if any other street railway company shall hereafter be granted the right to lay its track upon any street or part of street upon which the Des Moines Street Railroad Company, or its assigns, shall have a track, or tracks, of its railroad then laid, it shall on demand

of said company remove its track or tracks to such distance from the center of said street that the center of the street will be an equal distance from the nearest rail of the two roads when built; provided, however, that before it shall be required to make said removal the company desiring the same shall pay or tender the cost of making such change. And if upon such demand and tender of the
1058 cost of such removal the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshal, under the supervision of the City Engineer, at the cost of the company desiring such change, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided.

SEC. 8. Where any such railway shall be maintained along and upon any such alley, as provided for in section one, a single track only shall be laid and no side-tracks, switches or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys, with tracks laid upon and along streets, shall be allowed on any such alley; provided, however, that if said company shall have its depots, stations, stables or car houses on any lot fronting on such alley they shall — privilege of laying down turn-out tracks leading from such alley into such depots, stations, stables or car houses.

SEC. 9. The rate of fare upon any one line or route of railway shall not exceed five cents for each passenger for any distance on such route.

SEC. 10. The cars of said company shall be entitled to the track and in all cases where any team or vehicle shall meet or be overtaken by a street car, in said city, such team or vehicle shall give way to said car; nor shall any person willfully or maliciously obstruct, hinder or interfere with any of said railway cars by placing, driving upon or stopping, or causing to be placed or driven upon or stopped any team, vehicles or other obstacles in, upon, across along or near the tracks of said railway, after being notified of the approach of the car by the driver or conductor, by the ringing of the car bell or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the police judge of said city, be fined any sum not less than five nor more than twenty-five dollars.

SEC. 11. The City Council reserves to itself the right to require the said railroad company to adopt and use such improved and practicable motor power in operating its cars and to so amend this
1059 ordinance, with respect to the time and manner of running its cars, as the public necessity or convenience may require, and it further reserves to itself the right to hereafter require said railroad company to discontinue the use of any street or part of street that shall not be reasonably necessary for the operation of the system of a street car service now operated by said railroad company and to remove its track therefrom.

SEC. 12. If the said railroad company thereafter desires to extend its present lines of railway and use streets or parts of streets not now occupied by it, or if it shall desire to lay down additional and

parallel tracks upon streets or parts of streets now occupied, it shall file a written application therefor in the office of the City Clerk, specifying the streets or parts of streets so desired; thereupon the City Council shall investigate the same, and if it is deemed for the public good the right to so use such streets or parts of streets shall be granted under the provisions of this ordinance. Provided, that in the case of any extension, or in any case except that of a parallel track, the gauge of such track or tracks shall be four feet, eight and one-half inches.

SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railroad company in conformity with the following rules and regulations, to-wit:

First. No car shall be run at a greater rate of speed than eight miles an hour, but all cars shall maintain an average speed of six miles per hour, including stops between termini of any line.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or when cars are near — at stations.

1950 Fourth. No cars shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other purposes.

Fifth. No car shall be allowed to stop on a crosswalk, nor in front of an intersecting street, except to avoid collision, or to prevent danger to persons in the street or to take on or leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one on or near the track, the cars shall be stopped, when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductor shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers in a distinct tone the names of all the streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of other railway companies, at which excepted stations they may stand a longer time.

Twelfth. Cars shall start from both ends of any line as early at six o'clock A. M., and run continuously as late as twelve o'clock midnight; from six to nine o'clock A. M. and from nine o'clock P. M. to midnight cars shall run at intervals of not more than eight minutes.

1061 Thirteenth. Each of said cars shall be provided with a driver and a conductor, unless said railroad company shall place in said cars, not provided with a conductor, a box or a receptacle in which the passenger may himself deposit the fare.

SEC. 14. Within three days after the passage, approval and publication of this ordinance, the Mayor shall cause to be served upon the Des Moines Street Railroad Company a certified copy of this ordinance, and such service shall constitute a request upon the part of the city to said company to accept the same, and to file a written acceptance there or in the office of the City Clerk within twenty days after such service.

SEC. 15. Any officer, agent, manager or employé of said company, its successors or assigns, violating any of the provisions of this ordinance, shall, upon conviction thereof, be subject to a fine of not less than ten nor more than one hundred dollars; and the city may bring its suit to restrain any violation of the terms of this ordinance.

SEC. 16. Ordinance passed December 10, 1866, entitled, "An ordinance authorizing the construction of certain street railroads in and along the streets of the City of Des Moines, and amendments thereto, passed February 5, 1872; *and* and *an* ordinance passed September 14, 1886, entitled, "An ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, adopted December 10, 1866, and amendments thereto, passed February 5, 1872," Be and the same are hereby repealed.

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1062 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1063 EXHIBIT No. 63. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An Ordinance Imposing Additional Duties and Granting Certain Privileges and Exclusive Rights to the Des Moines Broad Guage Street Railway Company.

O. 138. P. July 27, 1888.

SECTION 1. Be it ordained by the City Council of the city of Des Moines: That the Des Moines Broad Guage Street Railway Company its successors and assigns be and the same are hereby authorized and empowered to construct, maintain and operate a single track of its railway, together with side-tracks and switches, upon and along Grand avenue from East Ninth Street to East Sixth street, thence south on Sixth street from Grand avenue to a connection with its line of railway on Locust street.

Also a single track of its railway upon Walnut street from its track on West Fourth street to West Sixth street thence north on

Sixth street to Locust street, thence west on Locust street from Sixth street to Fifteenth street, thence north, on Fifteenth street to north side of Grand avenue, together with all the necessary and convenient switches and side-tracks. Provided, however, that no switch shall be laid along or upon Walnut street. And the said Des Moines Broad Guage Street Railway, or its successors or assigns, are hereby ordered and required to equip and put in operation upon the lines of its street railway, now constructed and to be constructed upon the route herein given, at least six cars to be operated by electric or other motor power other than animal power or steam power on any street, and to have the same fully equipped and in operation within one year from the passage of this ordinance, and within two years from the passage of this ordinance it be required to construct at least two additional miles of street railway, either in extensions of its present lines within the city or its suburbs, or other routes granted to said company, or that may hereafter be granted to it by the City Council of the City of Des Moines, and that it equip and place in operation upon its lines of road within said time at least two additional cars.

1884 SEC. 2. The rights and privileges granted to and conferred upon the Des Moines Broad Guage Street Railway Company its successors and assigns, by ordinances of the City of Des Moines, passed December 20, 1887, and published December 24, 1887, and entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct, maintain and operate by electric or other motive power other than animal power or steam power, on any streets street railroads in the city of Des Moines and defining the powers and duties of said companies," and also the rights and privileges conferred upon said company by this ordinance to construct equip and operate street railways upon and along the streets of the city of Des Moines by electric or other motive power other than animal power or steam power og any street shall be exclusive upon the streets granted and that may be hereafter granted to said company, its successors or assigns, and upon the first street paralleling said street on each side thereof other than Grand avenue west of fifth street, in East Des Moines, for the term of ten (10) years from and after the date of the acceptance of this ordinance by the said Des Moines Broad Guage Street Railway Company as hereinafter provided for. And during said term the city of Des Moines shall not grant to or confer upon any other person or company any rights or privileges to construct any line of street railway for operation by electricity, or other motive power other than animal power or steam power, on any street upon which the rights of said Des Moines Broad Guage Company are made exclusive, or to equip any line for such operation or to operate the same by such electric or other power other than animal power or steam power on any such street, or grant to any person, company, or corporation any rights or privileges that will impair or destroy the rights and privileges granted in this ordinance, and said ordinance of December 20, 1887. Provided, however, the city reserves the right to grant to any other company during said term of ten years the right to construct and operate by any

power the Council may prescribe street railways upon any and all streets and alleys of said city not included within the terri-
1045 tory within which the rights of said Broad Guage Company or its successors are made exclusive as hereinbefore provided. And the city also reserves the right to permit such other company to use the tracks of the Des Moines Broad Guage Street Railway Company, its successors or assigns, for not exceeding the distance of two blocks at any point and not exceeding two points in the city, to be designated by the City Council, upon the terms and conditions prescribed in section sixteen of said ordinance of December 20, 1887. Provided, however, that nothing herein contained shall be so construed as to prevent the city from authorizing the construction and operation of a cable railway upon and along Grand avenue at any time hereafter, parallel to the tracks of the Des Moines Broad Guage Street Railway Company. And provided, further, that the exclusive rights herein granted upon streets running east and west between East Fifth Street and West Fifth street shall be confined to the streets or parts of streets upon which said company shall have a track of its street railway actually laid. And the city reserves the right to authorize some other company to construct and operate street railways upon any street running east and west between East Fifth street and west Fifth street upon which at the time of such grant the Des Moines Broad Guage Street Railway Company or its successors shall not have a track of its road actually laid.

SEC. 3. The exclusive rights and privileges granted by section two of this ordinance are upon the express condition that said Street Railway Company, its successors or assigns, shall substantially comply with the provisions of said ordinance of December 20, 1887, and with the requirements of this ordinance, and with such other reasonable rules and requirements as may be made by the City Council of said City. And if it shall fail to substantially comply with the provisions of said ordinance, so far as it can reasonably comply with the same with the number of cars herein provided for, then it shall forfeit the exclusive privileges granted herein.

SEC. 4. The city shall have power at any time after two years from the acceptance of this ordinance to require said street
1050 railway company, its successors or assigns, to make reasonable extensions or construct additional lines of street railway in said city, upon such routes as may be designated by the City Council, and equip and operate cars thereon.

SEC. 5. If at any time after two years from the acceptance of this ordinance the City Council shall by ordinance require said railway company, its successors or assigns, to construct, equip and operate any additional street railway upon any street or part of street to be designated in such ordinance, then it shall be the duty of said company within sixty days from the publication of such ordinance to notify the city in writing whether it will construct the same or not, and if it shall fail to serve such notice or having served the same shall fail for sixty days thereafter to commence the construction of such route, and continue the construction, equipment and operation with reasonable dispatch until the same is com-

leted, then said company shall forfeit its exclusive right to such reet, or part of street, and the Council may authorize some other mpany or person to construct and operate a street railway along ch route. Provided, however, the Des Moines Broad Guage Street ailway Company shall not be compelled to construct, equip or ut in operation more than one mile of street railroad in one year nder the provisions of this section.

Sec. 6. Within thirty days after the passage of this ordinance id company shall file with the City Clerk a written acceptance f this ordinance and the conditions, limitations and regulations bove expressed, signed by its President and Secretary, and from the ate of such acceptance this ordinance and the said ordinance passed ecember 20, 1887, together with the acceptance herein provided for, hall constitute a contract between the city of Des Moines and said ompany, binding upon both parties; and if said company shall fail o file such acceptance within the time above designated then this rdinance shall be void and of no effect upon either party.

Sec. 7. The rights and privileges granted in this ordi-
1067 nance shall only extend to the power vested in the City Council to grant the exclusive right herein provided, so that othing contained in this ordinance in the nature of a contract bind- ng the city of Des Moines and the Des Moines Broad Guage Street ailway Company, or its assigns, shall be held to hold the City of es Moines liable for damages to said Broad Guage Street Railway ompany for damages which said Street Railway Company may sus- ain by reason of the grants herein provided for.

O. 138. P. July 27, 1888.

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1068 & 1069 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1070 EXHIBIT No. 61. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

Book N, Page 211, August 6th, 1888.

The Des Moines Broad Guage Street Railway Company hereby ac- epts the ordinance entitled "An ordinance imposing additional ities and granting certain exclusive rights to the Des Moines Broad Guage Street Railway Company." Passed by the City Council on the 27th day of July, 1888, and approves the conditions, lim- itations and regulations expressed in said ordinance.

Dated this 28th day of July 1888.

(Sgd.) DES MOINES BROAD GUAGE STREET RAILWAY COMPANY

Attest:

(Sgd.) G. VAN GINKEL, *Pres't.*

H. E. TEACHOUT, *Sec'y.*

On motion the foregoing acceptance was read and ordered placed on record.

* * * * * * *

1071 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1072 EXHIBIT No. 65. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Warranty Deed (38).

Know all men by these presents, That Des Moines Broad Guage Street Railway Company, a corporation of Polk County, and State of Iowa in consideration of the sum of Ten Thousand Dollars, in hand paid by Des Moines Electric Railway Company of Polk County, and State of Iowa do hereby sell and convey unto the said Des Moines Electric Railway Company the following described premises, situated in the County of Polk and State of Iowa to-wit:

Lots numbered twenty seven (27) and twenty eight (28) in Block Forty five (45) in Stewart's addition to the City of Des Moines now included within the corporate limits of said city.

And we hereby covenant with the said Des Moines Electric Railway Company that we hold said premises by good and perfect title that — ha- good right and lawful authority to sell and convey the same, that they are free and clear of all liens and encumbrances whatsoever.

And we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

And the said ———— hereby relinquishes her right in and to the above described premises.

Signed the 31st day of July A. D. 1888.

DES MOINES BROAD GUAGE ST. RY CO.,
By G. VAN GINKEL, *President*,
H. E. TEACHOUT, *Sec'y*.

* * * * * * * *

1073 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1074 EXHIBIT No. 66. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

This indenture made and entered into on this 31st day of July A. D., 1888 by and between the Des Moines Broad Guage Street

Railway Company, a corporation organized under the laws of the State of Iowa, of the first part and the Des Moines Electric Railway Company a corporation organized under the laws of the State of Iowa of the second part, witnesseth, that the party of the first part for and in consideration of One Hundred and seventy-five Thousand Dollars has sold and by these Presents does sell, convey, assign and set over to and fully vest in said party of the second part all the foregoing described property situated in the County of Polk and State of Iowa to-wit:

All the street railway tracks, car barns, real estate and personal property now owned by the party of the first part excepting horses, situated in the City of Des Moines, Town of North Des Moines, Town of Grant Park and in the County of Polk, all of the cars heretofore used upon said tracks, all the franchises rights and privileges heretofore granted to said party of the first part by ordinances and resolutions of the City Councils of the City of Des Moines, the Board of Supervisors of Polk County and the Town of North Des Moines and all other rights privileges and franchises now held and owned by the party of the first part. The contracts heretofore made by the party of the first part with Thomson & Huston Electric Company for the electrical equipment of said railways, the party of the second part by accepting this conveyance assuming and agreeing to carry out all the obligations of the party of the first part under said contract, and all other rights privileges, property and assets of the party of the first part both real and personal, excepting
1075 the horses now owned by the party of the first part which are expressly reserved from the operation of of this sale and conveyance. And the party of the first part hereby covenants with the party of the second part that it is the owner of the property conveyed, that it has good right and lawful authority to sell and convey the same, and it hereby warrants said property to — free of any and all liens and incumbrances whatsoever.

In witness whereof the party of the first part has caused its name to be signed hereto by its President and countersigned by its Secretary this 6 day of July 1888.

DES MOINES BROAD GUAGE
ST. RY CO.
Per G. VAN GINKEL,
Pres't and Stockholder.
H. E. TEACHOUT,
Sec'y & Stockholder.
P. L. McATEE, *Stockholder.*
JOHN WEBER, *Stockholder.*

* * * * * * *

1076 (Endorsed:) Filed Sept. 15, 1905 E. R. Mason, Clerk

1077 EXHIBIT No. 67. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the District Court of Iowa in and for Polk County, September Term, 1888.

Equity. 1677.

THE CITY OF DES MOINES, Plaintiff,
vs.
THE DES MOINES STREET RAILROAD CO., Defendant.

Par. 1. The city of Des Moines states that it is a municipal corporation duly organized under the general incorporation laws of the state of Iowa, and is and has been for many years last passed a city of the first class.

Par. 2. That on the 10th day of December 1866, the council of said city of Des Moines, at the request and solicitation of the Des Moines Street Railway Company passed an ordinance relating to the construction and operation of a street railway by the said railway company in the streets of Des Moines; that thereafter and on the 5th day of February, 1872, said ordinance was, at the request of the said railway company, amended, and the plaintiff attaches to its petition a copy of said ordinance of December 10th, 1866, as amended by the ordinance of February 5th, 1872, marks the same "Exhibit A" and makes it a part of this petition.

Par. 3. That thereafter the said Des Moines Street Railway Company entered upon the streets of Des Moines and laid down and operated a street railway of the standard *guage*, four feet eight and one half inches (4 ft. 8½ in.) between the rails and continued to operate said railway so constructed for several years, when it changed the *guage* of its tracks and has for about fifteen (15) years last passed operated its system of railway over what is commonly known as a narrow *guage*, that is to say, a track of which the rails are three feet distant from each other.

1078 Par. 4. The plaintiff further states that when the ordinances heretofore mentioned, were passed the city of Des Moines had a population of not exceeding —— Thousand inhabitants, but that since said time the city has so increased in population that now not less than forty-five thousand (45,000) people live within its corporate limits; that the purpose of granting the franchise contained in said ordinance to the said railway company and the consideration therefor on the part of the city, was to secure to the people of Des Moines cheap and rapid transit over its streets, and that in addition to the express obligations assumed by the said railway company in and by said ordinance there was created the further implied obligation on the part of the company to furnish to

the people of said city a street car service commensurate with its wants and convenience; that it was also an implied obligation to the public assumed by the said company, that in its operation of its line of railway it would occupy no more streets or parts of streets for the transaction of its business than were reasonably necessary for the accommodation of the traveling public and its own convenience.

Par. 5. That during the year 1886, the said Des Moines Street Railway Company sold and assigned all its property and franchises including the right to operate a street railway in the streets of Des Moines as conferred by the ordinance, to the defendant, the Des Moines Street Railroad Company, and the defendant immediately entered upon the occupation of said streets and has continued for nearly two years in the exercise of said franchise and assumed all the obligations and duties expressly or impliedly undertaken by the said Des Moines Street Railway Company.

Par. 6. The plaintiff further states that the defendant and its grantor have failed continually negligently and wilfully during a long period of time to perform the obligations and agree-
1079 ments imposed by said ordinance and their relations to the public and the city, in the following respects among others:

1st. They have not constructed their railway upon the bridges, upon which they have laid down their tracks as required by section nine (9) of said ordinance in that they have not so laid the rails as to be level with the floor of the bridges, and the plaintiff charges the fact to be that it is entirely practical to lay said rails so that the tops thereof will be level with the floor of the bridges.

2d. They have constructed and maintained their tracks upon the paved streets of the city above the surface of the same so that public travel is greatly impeded and obstructed.

3d. They have failed, neglected and refused to provide and use carriages of the best style and class used on street railways in other cities.

4th. They have failed, neglected and refused to run their cars as rapidly as is required by the public good and convenience, and have wholly failed to give to the people of the city that service which of right they ought to have given.

5th. They have failed, neglected and refused to run their cars at the times or as often as is required for the public convenience.

6th. They have laid down their tracks on public streets without the consent and against the express command of the city council and have no intention of using the same in good faith, but have constructed such tracks solely for the purpose of securing possession of the said streets. They have so laid down tracks and allowed the same to remain for months, and years without using them or having any intention of using them, by which public travel has been greatly and unnecessarily impeded.

7th. They have laid down their tracks upon many streets and used the same where such occupation and use were wholly unnecessary for the reasonable operation of said railway or duty to the public, whereby public travel has been greatly and unnecessarily impeded and obstructed.

1080 8th. They have failed to make their annual statement of net receipts and to pay taxes thereon as provided by said ordinance.

9th. They have so constructed and so operated their line of railway that the same has long been and now is a nuisance in the streets of the city.

10th. They have refused to accept reasonable regulations and conditions attempted to be imposed by the city council and have defiantly resisted every exercise of reasonable authority on the part of the said city.

Par. 7. And the plaintiff avers that by reason of said violations of its contract and its franchise and such repeated refusals to perform its duties it has forfeited whatever rights were granted by said ordinance.

Par. 8. The plaintiff further states that on the 25th day of May, 1888, the council of the city of Des Moines for the purpose of securing the public good and welfare and correcting the evils and abuses heretofore named, adopted a resolution, a copy of which is hereto attached marked "Exhibit B" and made a part hereof; that on the same day an ordinance relating to the subject mentioned in said resolutions was introduced and was thereafter duly passed, a copy of which is attached hereto marked "Exhibit C" and made a part hereof; that a copy of said ordinance was duly served upon the defendants and it was requested to accept the same, but although more than twenty days have elapsed since the service of a copy of said ordinance the defendant refuses to accept the same, and the plaintiff shows that by the passage of said ordinance it secured to the said railway company every just right in view of its repeated violations of the former ordinance to which it was or is entitled; that the plaintiff is still willing, notwithstanding the conduct of the defendant, to grant to it the rights contained in said last mentioned ordinance or any other just and reasonable franchise so condi-

1081 tioned, that the city may exercise its proper control and authority over the streets within its corporate limits and protect the welfare and convenience of the public.

Wherefore the plaintiff prays that the contract and franchise contained in the said ordinance of December 10th, 1866, and February 5th, 1872, be forfeited, cancelled and declared void and of no effect and for costs of this suit.

(Signed) CUMMINS, WRIGHT & DEITRICK,
Attorneys for Plaintiff.

This is to certify that the above is a full, true and correct copy of the record of the City Council as shown in Record Book —, Page —, so far as it relates to the matters therein set out.

—— ——, *City Clerk.*
By —— ——, *Assistant.*

1082 STATE OF IOWA, *Polk County, ss:*

Wm. L. Carpenter, being first duly sworn upon his oath says that he is the Mayor of the City of Des Moines, that he has read the

foregoing petition and verily believes the statements therein made are true.

WM. L. CARPENTER.

Subscribed and sworn to before me this 10th day of July, 1888.

JAMES P. HEWITT,
Notary Public, Polk County, Iowa.

This is to certify that the above is a full, true and correct copy of the record of the City Council as shown in Record Book —, Page —, so far as it relates to the matters therein set out.

——— ———,
City Clerk.

By ——— ———,
Assistant.

1083 EXHIBIT "A".

An Ordinance Authorizing the Construction and Operation of Certain Street Railroads In and Along the Streets of the City of Des Moines.

O. 63. P. December 10, 1866.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.

Par. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

Par. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities: provided, said company shall at all times have the right to use their track for transporting
1084 iron, ties and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said company.

SEC. 4. The tracks of said railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may have established such grades, where the streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets; provided, that they raise the same to grade whenever the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the track; provided, said company shall plank the space between the tracks at each principal street crossing whenever required by the Street Committee.

SEC. 5. The said City of Des Moines shall not be held liable to said company for any damages that may be occasioned by the breaking of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement of repair of any street, unless there be unreasonable delay in making such repairs.

1085 SEC. . Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley, as provided for in section one, a single track only shall be laid, and no side tracks, switches, or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley; provided, however, that if said company shall have its depot, stations, stables, or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car-houses.

SECTION 7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five years (5) after the completion of the first mile of track, and thereafter shall not exceed the rate of six cents for any one route.

SEC. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said cars; nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said

1086 railway cars, by placing, driving, or stopping, or causing to be placed or driven in a slow pace, or stopped, any team, vehicle, or other obstacle, in, upon, across, along or near the track

of said railway or either of them after being notified by the driver or conductor by the ringing of the car bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section, shall, upon conviction thereof before the Police Judge of said City, be fined in any sum not less than five nor more than fifty dollars.

O. 131. P. February 5, 1872.

SEC. 9. This charter is granted, and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D. 1872, unless the City Council of said City shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and report to the city of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the construction of such given number of miles of said railway. Provided, that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the
1987 City of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order; and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall pay all expenses that may accrue by reason of such suit or suits, and unless such notices are given the time of the continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

SEC. 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said road is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

SEC. 11. After the year A. D. 1875, whenever there may be any fair grounds or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some

central part of the city, and it may be deemed for the public
1088 interest to have a street railway built to or near such fair grounds or other place of public resort, the City Council may, by a two-thirds vote require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such route within one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the same time and run the same upon the same terms as the company to which this grant is made.

SEC. 12. Said Company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be subscribed and sworn to by the Secretary and Treasurer of the company, and there shall be levied upon said net receipts a tax of three per cent. for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the city are liens: If such sworn statement as is above required is not made and filed with the City Treasurer within the time above described, the City Treasurer shall ascertain as near as may be, such net receipts, and the city tax shall be levied thereupon as above provided. And the tax herein above provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right
property or interest of any person in the same and the prop-
1089 erty and stock of said company, and the franchises thereof, in the same shall not be taxed in any other manner for any municipal purpose.

SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near at stations.

(4) No car shall be left to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

(5) No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street, or to take on or to leave off passengers.

(6) The conductors and drivers employed by said company

shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when, by so doing, such injury may be averted.

1090 (7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

(8) The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

(9) Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

(10) The cars after sunset shall be provided with signal lights.

(11) No car shall remain standing at any of the stations more than ten minutes except at stations for watering horses, and at each end of the lines, and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a long time.

SEC. 14. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grants hereinabove made with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever.

O. 63. P. December 10, 1888.

1091 EXHIBIT "B."

Whereas, a grave emergency has arisen respecting the street railway service of the city of Des Moines, and the measure of control possessed by the City Council over the streets and respecting its right to prescribe where, when and how street railway tracks shall be laid down and the manner in which the business shall be conducted, it has become a public necessity to investigate the relation which the Des Moines Street Railroad Company as the successor of the Des Moines Street Railway Company bears to the city under existing ordinances of this council.

1st. The Council finds that the original ordinance granting the Des Moines Street Railway Company the right to construct and operate its line of railway upon the streets of Des Moines was passed December 10th, 1864, and an amendment thereto February 5th, 1872. That by an ordinance passed September 13th 1886, the first mentioned ordinance and its amendment were repealed and said company granted certain rights and privileges not necessary to here enumerate.

2d. The Council further finds that said railway company and its successors have not only openly and publicly repudiated the ordinance of 1883, but have failed to conform thereto in many substantial and reasonable particulars and have continuously claimed and now claim that said ordinance was void and of no effect and that the said ordinance of 1856, with its amendments was and is in full force and obligation.

1092 3d. The City Council without admitting the invalidity of the ordinance of 1883, or recognizing the pretended rights of said company under said original ordinance and amendments has examined the construction of the line of railway and the long continued conduct of the company and its successor and compared the same with the requirements of said last mentioned ordinance and amendments and thereupon finds that said company and its successor have failed, neglected and refused to perform the conditions thereof or to comply with the reasonable requirements thereto prescribed in many respects among which are,

A. They have not constructed their railway upon the bridges used by them as required by section nine (9) of said ordinance.

B. They have maintained and now maintain their tracks upon the paved streets above the surface of the same so as to greatly impede and obstruct public travel.

C. They have maintained and now maintain their tracks upon streets not paved above the established grade so as to greatly impede and obstruct public travel.

D. They have failed neglected and refused to provide and use cars and carriages of the best style and class used on such railways in other cities.

E. They have failed, neglected and refused to run their cars at the speed or times reasonably required for the public convenience and good.

F. They have laid down tracks upon public streets without the consent of the City Council and without an intention in 1093 good faith to use the same but for the mere purpose of securing possession of such streets.

G. They have laid down their tracks upon many streets and used the same when such occupation and use were wholly unnecessary for the reasonable operation of the railway or the accommodation of the public whereby public travel has been greatly impeded and obstructed.

H. They have, against the express ordinance of the City and the direction of its officers, defaced and injured bridges and excavated and torn up streets and pavements in the unauthorized construction of railway tracks, to the great damage and inconvenience of the public.

I. They have failed, neglected and refused to lay their tracks as provided in section six (6), of said ordinance of 1856.

J. They have failed to make annual statements of net receipts and to pay taxes thereon as provided by said ordinance.

4th. The Council further finds that by reason of the aforesaid violations of the said ordinance and their duties imposed thereby on

the part of the Des Moines Street Railway Company and its successor, the Des Moines Street Railroad Company, the said last named company has forfeited all rights, privileges and franchises granted by said ordinance and amendments, and that the City has the right to annul the contract arising therefrom and repeal the same and that the public good requires that said contract be forfeited and annulled and the ordinance and amendments repealed if the same be now in force and effect.

1994 5th. The Council further finds that it would be inequitable and unjust, notwithstanding such repeated violations to deprive the said railroad company of the use of the streets so far as they are reasonably necessary to enable said company to operate the system now being operated by it and utilize all the property connected therewith; that therefore an ordinance should be passed granting franchise to said company, its successors and assigns and that the resolution hereunto appended should not be operative until the passage and approval of an ordinance having such object in view.

Therefore, Be it resolved by the City Council of the City of Des Moines: that all the rights and privileges of the Des Moines Street Railway Company or of its successor, the Des Moines Street Railroad Company, granted or conferred by the said ordinance of December 19th, 1866, and its amendments or by the ordinance of September 14th, 1886, are hereby forfeited and declared to cease and determine and that the contract created by said ordinances and each of them be and the same is forever annulled and cancelled.

This resolution shall take effect upon the passage of an ordinance having for its object and purpose the grant of the right to the Des Moines Street Railroad Company, its successors and assigns to use such streets as are reasonably necessary for the operation of its present system of service under such reasonable regulations as may be prescribed.

Be it further resolved that in the event of a refusal of said railroad company to accept the ordinance last mentioned if it shall be passed and approved within the time therein specified the

1995 City Solicitor is hereby authorized to institute such proceedings as he may determine to be necessary to give effect to and enforce the forfeiture herein declared and he is further empowered to employ such additional counsel as he shall deem expedient.

Be it further resolved that the Mayor be instructed to cause a certified copy of these resolutions to be served upon the said Des Moines Street Railroad Company within three days after their adoption and approval.

This is to certify that the above is a full, true and correct copy of the record of the City Council as shown in Record Book —, Page —, so far as it relates to the matters therein set out.

———— *City Clerk.*

By ———— *Assistant.*

1095 EXHIBIT "C."

An ordinance authorizing the maintenance and operation of a street railroad by the Des Moines Street Railroad Company, in, upon, and along certain streets of the City of Des Moines, providing penalties for a violation thereof; and to repeal an ordinance entitled, "An ordinance authorizing the construction of certain street railroads in and along the streets of the City of Des Moines," passed December 10th, 1863, and amendments thereto, passed February 5th, 1872; and to repeal an ordinance passed September 11th, 1880, entitled "An Ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, adopted December 10th, 1863, and amendments thereto, passed February 5th, 1872."

SEC. 1. That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railroad Company, its successors and assigns to maintain and operate a single or double track for passenger railway lines, with all necessary and convenient tracks for turnouts, side-tracks and switches in, upon and along so much of the streets or parts of streets of the City of Des Moines as are now occupied by the tracks of said railroad company in actual use except as hereinafter provided, and upon such alleys only fronting on which said company has depots, stables or car houses, and upon no other streets or alleys, unless upon written application to the City Council as herein provided the right to so use and occupy other streets and alleys shall be hereafter granted. And authority is hereby given said company its successors and assigns to keep, maintain, use and operate its railway
1097 cars in the manner, for the time and upon the conditions herein mentioned and prescribed and upon such other conditions and upon such further reasonable regulations as the City Council may hereafter prescribe.

SEC. 2. The City Engineer shall within five days after the passage of this ordinance make a survey of the tracks now owned and operated by said railroad company and file in the office of the City Clerk a plat or map duly certified showing what streets or parts of streets are at the time of the passage of this ordinance being actually used by said railroad company in the operation of its street railroad.

SEC. 3. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks, unless the right to do so be hereafter granted by ordinance.

SEC. 4. Said tracks and railways shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities. Provided, said company shall

at all times have the right to use its tracks for transporting iron, ties and other material for maintaining its road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may hereafter be entered into by said between the City of Des Moines and said company.

1998 SEC. 5. The tracks of said railroad shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the City has or may have established such grades; where the streets are not at the established grade said Company must until they are so graded maintain its track so as to conform to the surface of such streets. Provided, that it shall raise or lower the same grade whenever the City shall grade said streets or any part thereof, and in case said City shall at any time pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve and maintain a space three and one half feet in width on each side of the center of its track so that it shall subsequently correspond with the paving or improvement of the remainder of the street.

Provided said company shall plank the space between the tracks at each principal street crossing, and shall, where its crossings are laid upon paved streets make the top surface of its rails level with the surface of the adjacent pavement, and shall in crossing bridges make the top surface of its rails level with the floor of such bridges. And during the course of the improvement of any street, whether by grading, sewering or paving, said company shall move and adjust its tracks so as not to interfere with the performance of such work.

SEC. 6. The said City of Des Moines shall not be liable to said company for any damage that may be occasioned by the breaking of any gas or water pipe or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes or the necessary repairing of the same, or from the improvement of any street, unless there be unreasonable delay in making such repairs.

1999 SEC. 7. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, except where a double track is contemplated or where some other company is or shall hereafter be authorized to lay a track on the same street, in either of which last named cases the track shall be laid at such distance from the center of the street that the center of the street shall be an equal distance from the nearest rail of each of the two lines of the road, and the distance from the center of the street to the nearest rail shall be fixed by the City Engineer.

And, Provided, further that if any other street railway company shall hereafter be granted the right to lay its track upon any street or part of street upon which the Des Moines Street Railroad Company or its assigns shall have a track or tracks of its railroad then laid, it shall on demand of said company remove its track or tracks to such distance from the center of said street, that the center of the street will be an equal distance from the nearest rail of the two roads, when built; Provided however, that before it shall be required to make said removal the company desiring the same shall pay or

the provisions of this ordinance. Provided that in case of any extension or in any case except that of a parallel track the gauge of such track or tracks shall be four feet, eight and one half inches.

SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railroad company in conformity with the following rules and regulations, towit:

1. No car shall be run at a greater rate of speed than eight miles an hour, but all cars shall maintain an average speed of six miles per hour including stops between termini of any line.

2. While cars are turning corners from one street to another the horses or mules attached thereto shall not be driven faster than a walk.

3. Cars driven in the same direction shall not approach
1102 each other nearer than a distance of two hundred feet except in cases of unavoidable necessity or accident or when cars are near at stations.

4. No cars shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other purposes.

5. No car shall be allowed to stop on a cross-walk or in front of an intersecting street, except to avoid collision, or to prevent danger to persons in the street, or to take on or leave off passengers.

6. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped, when by so doing such injury may be averted.

7. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

8. The conductor shall use proper diligence to prevent ladies or children under twelve years of age, from leaving or entering the cars while in motion.

9. Conductors shall announce to passengers in a distinct tone the names of all the streets crossed as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

10. The cars after sunset shall be provided with signal lights.

11. No car shall remain standing at any of the stations more than ten minutes except at stations for watering horses and at each
1103 end of the lines, and the stations nearest the passenger depots of other railway companies, at which excepted stations they may stand a longer time.

12. Cars shall start from both ends of any line as early as six o'clock A. M. and run continuously as late as twelve o'clock midnight: From six to nine o'clock A. M. and from nine o'clock A. M. to midnight cars shall run at intervals of not more than eight minutes.

13. Each of said cars shall be provided with a driver and a conductor, unless said railroad company shall place in said cars not provided with a conductor, a box or a receptacle in which the passenger may himself deposit the fare.

SEC. 14. Within three days after the passage approval and pub-

lication of this ordinance, the Mayor shall cause to be served upon the Des Moines Street Railroad Company, a certified copy of this ordinance; and such service shall constitute a request upon the part of the city to said Company to accept the same, and to file a written acceptance thereof in the office of the City Clerk within twenty days after such notice.

SEC. 15. Any officer, agent, manager or employee of said company, its successors or assigns violating any of the provisions of this ordinance shall upon conviction thereof be subject to a fine of not less than ten nor more than one hundred dollars; and the City may bring its suit to restrain any violation of the terms of this ordinance.

SEC. 16. Ordinance passed December 10th, 1866, entitled, "An ordinance authorizing the construction of certain street railroads in and along the streets of the City of Des Moines and amend-
1104 ments thereto, passed February 5th, 1872; and an ordinance passed September 14th, 1886, entitled "An ordinance to amend an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines adopted December 10th, 1866, and amendments thereto, passed February 5th, 1872," be and the same are hereby repealed.

SEC. 17. This ordinance shall take effect and be in force from and after its passage and publication *and* provided by law.

This is to certify that the above is a full, true and correct copy of the record of the City Council as shown in Record Book —, Page —, so far as it relates to the matters therein set out.

——— ———, *City Clerk.*

By ——— ———, *Assistant.*

1105 STATE OF IOWA, *Polk County, ss:*

I, B. F. Coffin, Clerk of the District Court within and for the County and State aforesaid do hereby certify the foregoing to be a full, true, correct and complete copy of Petition in the case of The City of Des Moines, Plaintiff *vs.* The Des Moines Street Railroad Co., Defendant, No. 1677 Equity, as full, true, correct and complete as the same remains of record in my office.

In testimony whereof, I have hereunto set *my* hand and affixed the seal of said District Court, this 21 day of April, 1906.

[SEAL.] (Sgd.) B. F. COFFIN,
Clerk of said Court.
By CALVIN HICKS, *Deputy.*

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1106 EXHIBIT No. 68. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

THE CITY OF DES MOINES
vs.
THE DES MOINES STREET RAILROAD COMPANY.

Motion.

Now comes the above named defendant and moves that the plaintiff be directed and required to make its petition more definite and specific and certain in each of the following particulars, to-wit:

First. Page 3, Sub. Par. 2.

That plaintiff state upon what streets, and parts of street defendant has constructed and maintained its tracks as stated in said paragraph.

Second. Page 3, Sub. Par. 3.

That it state in what respect defendant's railway carriages are not in the best style and class used in other cities, and whether said allegation is intended to apply to all of defendant's cars or carriages, and if not to all to what particular ones.

Third. Page 3, Sub. Par. 4.

That it state whether defendant has or has not run its cars as rapidly as it is permitted to do by the ordinance under which its road was constructed, and in what respect it has failed to give the people the street railway service to which they are entitled and especially that it state, whether any and if so what change it has at any time been notified or requested by plaintiff to make in either of the respects stated in said paragraph.

Fourth. Page 3, Sub. Par. 5.

That it state when and as to what streets defendant has failed in the respects stated in said paragraph and where and when it refused to run its cars as often as required; what notice was given to it in that respect and when and by whom and whether it does or does not run its cars as often as required by the ordinance under which its road was constructed.

Fifth. Page 3, Sub. Par. 6.

That it state when and upon what streets or parts of streets it has committed the acts stated in said paragraph and especially that it state upon what streets it has done the acts therein stated against the

command of the plaintiff, and that it state when and in what form such command was given.

Sixth. Page 4, Sub. Par. 7.

That it state when and upon what street or streets it has laid down and used its tracks when the same were unnecessary, and
1107 whether it has done so upon any street in said city where plaintiff's claims it was not authorized to construct and operate its railway, and whether it was or was not in any way notified that it was constructing any of its tracks either where plaintiff claims it had no right to construct them or where it claimed such track was not necessary for the public convenience.

Seventh. Page 4, Sub. Par. 18.

That it state when or for what years it has failed to make the report therein referred to, or to pay the taxes therein specified, and whether it has not paid in full all taxes required by or which became due under an assessment of its property as made by said plaintiff.

Eight. Page 4, Sub. Par. 9.

That it specify in what particulars and in what places defendant's road has become a nuisance and when it first came to the knowledge of the plaintiff and its officers that defendant's road was a nuisance.

Ninth. Page 4, Sub. Par. 10.

That it specify when and what regulations it has refused to accept and if said regulations were in writing or by resolution or ordinance that it make the same a part of said petition, and that it state in particular whether defendant has refused to accept any regulation which the said plaintiff by its contract authorizing the construction of said road retained to its self the power to make, and that it state what authority it defiantly resisted and when and where in what form such authority was attempted to be exercised.

PARSENS & PARRY AND
KAUFFMAN & GUERNSEY,
Defendant's Attorneys.

This is to certify that the above is a full, true and correct copy of the record of the City Council as shown in Record Book —, Page —, so far as it relates to the matters therein set out.

—— ——, *City Clerk.*
By —— ——, *Assistant.*

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1108 EXHIBIT No. 69. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance amending an ordinance entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines," and granting additional rights to the Des Moines Electric Railway Company, successors of said Des Moines Broad Guage Street Railway Company.

Be it ordained by the Town Council of the Incorporated Town of North Des Moines:

SECTION 1. That section one of an ordinance entitled "An ordinance authorizing the Des Moines Broad Guage Street Railway Company, to construct and operate street railroads in the incorporated town of North Des Moines," of date July 6, 1886, be amended so as to read as follows: Consent permission and authority *is* hereby given and granted to, and vested in the Des Moines Electric Railway Company and its successors and assigns, to construct, equip, maintain and operate for the term of twenty-five years upon conditions hereinafter stated, a single standard four feet eight and one-half inch *guage* street railway track, along and over the streets, alleys and bridges of and within the town of North Des Moines hereinafter designated, and such other streets and alleys of said town, as said Company may select with the consent and approval of the town council and to construct and use in connection therewith all necessary and convenient tracks for turn outs and side tracks along the street and such alleys only fronting on which said company shall have depots, stables, car-houses or power stations, and to construct and Use in connection therewith all appliances and apparatus necessary or convenient to the practical equipment and operation of the cars upon said tracks, by electric or such other practical motive power as may be adopted by said company for
1109 the operation of its street railways in the City of Des Moines; and in constructing and operating said railroads said company shall have the right to intersect or cross the tracks of any street or other railway.

SECTION 2. That section — of said ordinance is hereby amended to read as follows: The streets specifically referred to in section one hereof are the following: Sixth street from the south line to the north line of said town; Forest avenue from Sixth street to the west corporate limit of said *town*.

SECTION 3. That section three of said ordinance is hereby amended so as to read as follows: The cars to be used upon said tracks shall be of the same style and class in use, at same time by said company upon its tracks in the City of Des Moines, and shall be operated by electrical power, animal power, or other practical motive power such as said company may at same time use upon its

tracks in the city of Des Moines; provided, that if other power than animal power is used, said cars shall run upon a schedule time of not less than six miles, not to exceed twelve miles per hour, and said track and cars shall be used for the purpose of transporting passengers and their ordinary baggage only; provided further that said company shall at all times have the right to use said tracks for the purpose of transporting materials to be used by it in constructing, repairing and operating said road.

SECTION 4. That section twelve of said ordinance be, and *the* is hereby amended so as to read as follows: Said company is required to run its cars over its line of railway on Sixth street, in connection with its lines through the city of Des Moines, so as to make continuous trips to and from Fourth and Locust streets in said city, to the north and west ends of its line, in the town of North Des Moines, with the same motive power that it shall use in said city, within six months from the passage of this amendment, and to construct and put in operation a line of its road on Forest avenue within nine months from the passage of this ordinance, provided
1110 & 1111 that if Forest avenue shall be paved within that time, that the *the* tracks shall be laid at the same time the pavement is laid, and provided further that if said company shall be prevented by injunction, or orders of courts or by other means, beyond its control, from complying with the provisions of this section with the time specified herein, then the time of such necessary delays shall be added to the time specified as an extension of such time. And if said company shall fail to comply with the provisions of this section, as to either street within the time herein allowed, then it shall be lawful for the town council to declare a forfeiture of the rights of said company to occupy said streets or both streets herein granted; if neither of them have been occupied according to this ordinance, within the time specified, and compel a removal of the tracks from such streets.

SECTION 5. That section thirteen of said ordinance is hereby amended so as to read as follows: Within thirty days after the passage of this ordinance, said company, its successors, assigns, shall file with the recorder of the town of North Des Moines a written acceptance of the grant herein, with the conditions, regulations and limitations herein expressed, signed by the president and secretary of said company. And upon failure to file such acceptance, this ordinance shall not become operative to vest in said company any rights or privileges not previously acquired under said original ordinance.

SECTION 6. This ordinance shall take effect and be in full force from and after publication as required by law.

Ordinance passed August 8, 1888.

J. B. LOUGHRAN, *Mayor.*
JOHN McVICAR, *Recorder.*

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1112 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1113 EXHIBIT No. 70. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

July 19, 1888.

An ordinance amending an ordinance entitled an ordinance authorizing the Des Moines Broad Guage Street Railway Company, etc. was read a first time and referred to a committee.

August 8, 1888.

An ordinance amending an ordinance entitled an ordinance authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines, and granting additional rights to the Des Moines Electric Railway Company, successors to said Des Moines Broad Guage Street Railway Company, was read a third time and adopted by vote as follows: Yeas: Conrad, Green, Hill, Howell, Twining and mayor, 6 Nays 0.

August 27, 1888.

The Des Moines Electric Railway Company filed their acceptance of ordinance as amended 8th day of August 1888.

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1114 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1115 EXHIBIT No. 71. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 278, Oct. 9th, 1888.

Business resumed under the call—Being to consider a communication from the Des Moines Electric Railway Co. to his Honor the Mayor in relation to laying tracks on Walnut Street between 4th & 6th streets with the Mayor's endorsement thereon. And the communication of the City Engineer in relation thereof, together with plat of said street & contemplated lines of Street Railway as ordered by Ald. Weitz & Drady.

Said matter having been made a special order for this time—The communication from the president of the Electric Street Railway is as follows—

Hon. W. L. Carpenter, Mayor of the City of Des Moines.

DEAR SIR: You are notified that the Des Moines Electric Railway Company desire to lay a single track of its street Railway along West Walnut Street from a connection with its tracks on 4th Street, to Sixth Street, and thence along 6th street from Walnut to Locust Sts.

You are therefore requested to cause the place along said streets where said tracks shall be laid to be fixed and located and the pavement to be appraised by the proper officers of the city so we can pay for the pavement and commence the construction without unnecessary delay.

Aug. 4th, 1888.

(Sgd.) DES MOINES ELECTRIC RAILWAY CO.,
By R. N. BAYLIES, *Pres't.*

The following endorsement on above Com. by Wm. L. Carpenter, Mayor,

DES MOINES, *Aug. 4th*, 1888.

Chas. Bennett, City Engineer, Des Moines, Iowa:

You are hereby instructed to make the appraisement of pavement and location of tracks as requested by the within notice.

(Sgd.) WM. L. CARPENTER, *Mayor.*"

1116 Book N, Page 294, Oct. 30th, 1888.

Ald. Baker offered the following—

Resolved by the City Council of the City of Des Moines—

That consent, permission and authority *is* hereby given and granted to and vested in the Des Moines Electric Railway Company to construct, maintain and operate its Street Railway on and along West 4th Street in the City of Des Moines from the North line of Court Avenue to the North line of Vine Street—The same to be constructed and operated in accordance with the charter and Ordinances heretofore granted by the City to the Des Moines Broad Guage Street Railway Company its successors and assigns—

Ald. Baker moved to adopt—

Ald. King moved to refer to Com. on Railroads—Roll call on motion to refer—Yeas King & Macy—2—Nays Baker, Bolton, Drady, Egan & Weitz—5—

Motion to refer lost—On original motion to adopt the yeas were, Baker, Bolton, Drady, Egan, Weitz—5—Nays King, Macy—2—The motion to adopt prevailed—

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1117 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1118 EXHIBIT No. 72. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book X, Page 280, Oct. 9th, 1888.

To the Honorable Mayor and City Council of the City of Des Moines, Iowa.

GENTLEMEN: I beg leave to call your attention to the situation of West Walnut street between 4th & 6th Streets in connection with the laying of a street railway track thereon by the Des Moines Electric Railway Company—

And the relaying of the present tracks of the Des Moines Street Railway Company and the laying of an additional track by the last named company on said Walnut Street between 5th & 6th Streets.

The portion of Walnut Street between 4th & 6th Streets is the principal business street of the City. Between 4th & 5th Streets the distance between the curbs is 58 feet and between 5th & 6th Streets the distance between the curbs is 46 feet.

It is my opinion that the distance between the curbs should be divided between the three tracks contemplated so as to do the least possible injury to public travel, and abutting property, and at the same time leave ample space for the passage of cars on said tracks.

I am also of the opinion that as the Electric Railway Company's right of way is on 4th Street from Locust to Walnut, on Walnut from 4th to 6th and on 6th from Walnut to Locust that the public safety requires that it should not be permitted to cross the double tracks of the other road on 4th Street and back again at 6th Street but should be compelled to lay its track on the north side of Walnut. And the Des Moines Street Railway Company should lay its tracks, on the south side of the street, and the other near the center of the street.

1119 After looking carefully over the ground I believe the very best possible arrangement of these tracks for the public safety and public convenience is as follows—The south Rail of the south track of the Des Moines Street Railway Company should be placed 18½ feet north of the south curb line between 4th and 5th Streets, and the south rail of the north track of said road should be 26½ feet north of the south curb line.

The Des Moines Electric Railway Company should be required between 4th & 5th Streets to lay its north rail 18½ feet south of the north curb line. By this arrangement there will be 18½ feet of space on each side between the curb and the rail, and five feet between the different tracks.

The distance between the curbs on West Walnut Street between 5th & 6th Streets is 46 feet and in the event that three tracks be laid between said points—I would advise that the space between the curb line and nearest rail on each side be fixed at 13 feet; and

that the south rail of the north track of the Des Moines Street Railway Company be fixed at 21 feet north of the south curb line between 5th & 6th Streets—If only two tracks are laid between 5th & 6th Streets then the space between the curb line and the nearest rail should be 16′ 8″ on each side.

(Sgd.) CHAS. BENNETT,
City Engineer.

On motion the foregoing papers were placed on file.

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1120 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1121 EXHIBIT No. 73. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 302, November 8th, 1888.

Petition of Des Moines Electric Railway Co.

In relation to reconstructing the curve at 4th & Center Streets so that cars can run over the same in safety—was referred to Com. on Paving with Eng. & Sol.—

Resolution Right of Way to the Electric Street Ry. passed Oct. 20th, 1888—Was recalled & reconsidered And on motion was substituted by the following resolution. Viz—

Resolved by the City Council of the City of Des Moines, That consent and permission and authority *is* hereby given and granted to the Des Moines Electric Railway Company to construct & Operate its Street Railway along Fourth Street in West Des Moines from the North line of Court Avenue to the North line *of* side of the Alley parallel with And next south of Court Avenue.

The same to be constructed and operated in accordance with the charter and ordinances heretofore granted to the Des Moines Broad Guage Street Railway Company—its successors and assigns.

On motion the foregoing resolution was adopted on roll call as follows—Yeas Bolton, Egan, Brady, King, Morris & Weitz—6—Nays Macy—1—Approved by the Mayor.

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1122 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1123 EXHIBIT No. 74. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Nov. 13, 1888.

The mayor stated that several representatives of the Des Moines Street Railway Company had been arrested and brought before him upon a charge of violating ordinance No. 38 of said town by tearing up the pavement on Ninth Street preparatory to laying rails upon said street without first having obtained the passage of an ordinance by the town council of said town granting them the right to enter upon streets as provided in said ordinance No. 38; that an adjournment of the case had been agreed to, and he had called this meeting to advise with the council with reference thereto. A written request was submitted to the council from said company asking the privilege of laying their track on Ninth Street from their present terminus to Franklin Avenue, which was read and ordered placed on file. L. Twining submitted an ordinance he had prepared, which contemplated granting said company the right to lay their tracks on said streets *by* the same was found incomplete, and on motion of Conrad and vote of council, Attorney A. G. Kingsbury, who was present, was invited to prepare such an ordinance as was contemplated in chapter 38 of the revised ordinances of the town—

After such ordinance was prepared by the attorney the same was read a first time. On motion to suspend rules and read a second time, same being second vote was as follows: Yeas: Hill, Howell, Conrad, Schramm, Twining and mayor—6—Nays, 0. So the rules were declared suspended and the ordinance was read a second time by its title. Upon motion by Hill, and repetition of the above vote the rules were again declared suspended and said ordinance was read a third time. On motion to adopt said ordinance the vote stood: Yeas, Hill, Howell, Conrad, Schramm, Twining and mayor, Yeas, 6; Nays 0. So the ordinance was declared adopted, and became chapter XLV of revised ordinances of said town.

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1124 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1125 EXHIBIT No. 75. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting permission to the Des Moines Street Railroad Company to extend their track upon Ninth street from Clarkson street to Franklin avenue.

SECTION 1. Be it ordained by the town council of the town of North Des Moines that consent is hereby given the Des Moines Street Railroad Company to lay its track along and upon Ninth Street in said town from Clarkson street north to Franklin avenue in accordance with the provisions of chapter 38 of the ordinances of said town.

SECTION 2. Said track shall be constructed of the same guage as the present track of said company, along the center of said Ninth street of first quality, forty-pound steel tram rail, laid upon good oak stringers resting upon the paving bed of said street, and firmly filled between and on either side of said rails—paving blocks, gravel and tar of as good quality and in as good condition as the same now are.

SECTION 3. Said company shall remove no more of the paving of said street than is absolutely necessary for the purpose of so extending said tracks, and shall lay said rails so that the tops thereof shall be even with the surface of said paving blocks; shall do and complete said work as expeditiously as possible, and shall leave the street, or portion of street, upon which it shall so construct its track in a finished and good condition.

SECTION 4. Before said company commences or proceeds with said work it shall file with the recorder of said town its acceptance of this ordinance, and shall at the same time file therewith security, to be approved by the mayor of said town, in an amount equal to three times the cost of said paving to be removed as above provided, said cost to be ascertained by the town engineer, or shall file in lieu of said security the waiver of the several abutting property holders for their respective portions of said paving.

1126 This ordinance shall be in force from and after its publication as provided by law.

(Signed) J. B. LOUGHRAN, *Mayor.*

Attest:

(Signed) EDWIN CONRAD,
Recorder Pro Tem.

Passed November 13, 1888. Published November 16, 1888.

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1127 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1128 EXHIBIT No. 76. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book X, Page 381, Des Moines, January 10th, 1889.

Petitions of citizens of Center Street and vicinity, asking that Des Moines Electric Railway Company be granted the right to construct and operate its Electric Street Railway along Center St. from 4th Street.

On motion the petition was adopted and granted as prayed for. Ald. Egan offered the following—

Resolved by the City Council of the City of Des Moines—That consent permission and authority *is* hereby granted to the Des Moines Electric Railway Company its successors and assigns to construct and operate its Electric Railway on Center Street from 4th to 20th Street, the same to be constructed and operated on connection with the said line on 4th Street, and in accordance with the ordinances granting rights to the Des Moines Broad Guage Street Railway Co., its successors and assigns, provided, however, that said company is authorized to use a "T" rail for its track on Center Street where the street is not paved, and until said street is paved On motion the foregoing resolution was adopted—Approved by the Mayor.

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1129 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1130 EXHIBIT No. 77. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Electric Railway Company the right to extend its tracks and electrical equipments on Clark street in the incorporated town of North Des Moines, Iowa.

Be it ordained by the mayor and town council of the incorporated town of North Des Moines:

SECTION 1. That consent, permission and authority *is* hereby given and granted to the Des Moines Electric Railway Company, its successors and assigns, to extend, construct and operate its street railway on Clark street from Sixth Avenue to the west corporate limits of said town.

SECTION 2. That said extension shall be completed by the first day of June, 1889, unless prevented by the street not being opened

and placed at a practical grade for said road by said date, and shall be completed to the west corporate limits within three (3) months after said street is opened and placed at a practical grade. Said company obligate themselves to bring street to grade at their own cost and expense, provided that the time of unavoidable delays caused by inclement weather shall be added to the time herein granted as an extension of such time.

SECTION 3. Until said Clark street shall be paved said company is authorized to use T rails for its tracks but in all other respects said road shall be constructed and operated in accordance with the ordinances and amendments thereto heretofore passed by the council granting certain privileges to the Des Moines Broad Guage Street Railway Company, its successors and assigns.

SECTION 4. Said company shall operate its cars over said extension and in connection with the Sixth avenue line upon a schedule time of one car each way at intervals not greater than thirty
1131 minutes apart for the first year, and thereafter upon such reasonable schedule of one car each way not less than fifteen minutes apart, as the council may prescribe, and cars on said line shall run so as to deliver passengers on Locust street in the city of Des Moines without change of cars.

SECTION 5. Said company shall accept this ordinance within thirty days after its passage or the same shall be void and no rights vest in said company thereunder.

Ordinance passed February 18, 1889.

J. H. LOUGHRAN, *Mayor.*
SIMON SWIHART, *Recorder.*

I hereby certify to the above being a true and correct copy of an ordinance granting rights as therein shown — the Des Moines Electric Railway Company by the town of North Des Moines as shown by the records in my office.

Witness my hand this 6th day of June, 1889.

W. B. TOMPKINS,
Recorder of North Des Moines.

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1132 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1133 EXHIBIT No. 78. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Electric Railway Company a right to construct and operate a line of its street railway on North street.

Be it ordained by the Mayor and Town Council of the incorporated town of North Des Moines:

SECTION 1. That consent, permission and authority *is* hereby

granted to and vested in the Des Moines Electric Railway Company, its successors and assigns, to build, equip and operate a line of single track of its street railway over and along the following streets; North street from Seventeenth street to the west corporate limits of said town.

SECTION 2. Said company shall operate its line on said street in connection with its line into the city of Des Moines, and under the rules and regulations prescribed in its charter for that city, and it is authorized to use "T" Rails upon said street so long as the same is unpaved, but when said street is paved it shall use such rail as the town may order, and shall pave or otherwise improve the space between its tracks to the satisfaction of the town engineer at its own expense. Said track shall conform to the surface of the street at all times as the same is now or may be at any time placed in by said town. The right herein granted shall endure for twenty-five years, and the town shall at all times have an equitable control over said street and railway.

SECTION 3. This ordinance shall be accepted within thirty days from its passage, by said company, or shall be void.

AMENDMENT 1. The company *are* required to plank all street and alley crossings when requested to do so by the town council.

AMENDMENT 2. That the word- "that city" in fourth line of section 3, be changed to "North Des Moines."

1134 The ordinance with amendments, passed April 4, 1889, and was accepted by the company on the same date.

JOHN McVIRACR, *Mayor.*
W. B. TOPMKINS, *Recorder.*

I hereby certify that the above is a true and correct copy of the records as they appear.

W. B. TOMPKINS,
Recorder of North Des Moines.

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1135 (Endorsed: Filed Sep. 15, 1905. E. R. Mason, Clerk.

1136 EXHIBIT No. 79. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 26, 1889.

Special meeting of Town Council of North Des Moines at Forest Home School House, to take action regarding the appointment of counsel to represent the town of North Des Moines in the coming suit between the Des Moines Street Railway Company and Broad Guage Street Railroad Company? Moved by Mr. Fink that mayor be instructed to employ Mr. Wishard to represent the town in the street

railway contest. Amended by Green that counsel's fee does not exceed fifty dollars ($50.) carried.

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1137 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1138 EXHIBIT No. 80. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 523, May 1st, 1889.

The committee on Streets and Alleys to whom was referred the matter of Street Railway Tracks on Cottage Grove Avenue from 19th to 21st reported by resolution as follows—

Be it resolved by the City Council of the City of Des Moines. That the Des Moines Electric Street Railway Company be instructed and required to lay its tracks 5 feet from and north of the north rail of the Des Moines Street Railway Company on Cottage Grove avenue between 19th and 21st streets.

Provided. That the tracks of said Electric Railway shall only be maintained at such place on said streets until further order of the Council, and that the Mayor be empowered to enforce this resolution. The foregoing resolution was adopted on roll call as follows—Yeas Bolton, Brady, Hammer, Morris, Reynolds, Sheldon, Smith & Weitz—8—Nays none—Absent Macy—1—

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1139 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1140 EXHIBIT No. 81. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 530, May 6th, 1889.

Ald. Sheldon offered the following—Resolved—That the Board of Public Works be ordered and directed to notify the Des Moines Electric Railway to take up and remove the unoccupied rails on 12th & Grand Avenue, or to bring the track so it will not interfere with public travel—On motion adopted.

Approved by the Mayor.

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1141 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1142 EXHIBIT No. 82. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 563, May 27th, 1889.

The special committee on street railroads reported as follows:

To the Hon. Mayor and City Council:

Your committee to whom was *con*ferred the within petition and resolution in regard to the Electric Street Railway Company running on 16th, 17th or 18th or on either of those streets have investigated the situation of the matter and after due consideration report and respectfully recommend to this Council that right of way be given the said Electric Street Car Co. and its assigns to run on Center St. to 21st street and north on 21st st. to Cottage Grove Avenue and west on Cottage Grove Avenue to 24th street, with single line only on Cottage Grove Avenue, and north on 24th street to north city limits with single line and switch between Cottage Grove Avenue and Atkins street, provided that the said Electric St. Car Co. will run and operate their line of railway strictly according to all rules and conditions contained in their charter previously given them by this Council, But nothing in this report shall be held to deprive said company of the right heretofore granted it to build its road 18th between Center & Crocker St.; We also recommend that said company be permitted to use "T" rail until the streets are payed.

(Sgd.) CHAS. WEITZ,
GEO. W. SHELDON.

On motion adopted on roll call as follows: Yeas—Bolton, Drady, Hammer, Reynolds, Sheldon, Smith & Weitz—7—Nays—Morris (1) absent Macy (1).

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1143 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1144 EXHIBIT No. 83. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 569, May 27th, 1889.

Ald. Morris offered the following—

Be it resolved by the City Council of the City of Des Moines, That consent, permission and authority *is* hereby granted to and vested

in the Des Moines Electric Street Railway Company, its successors and assigns to construct, equip and operate a line of its street railway from Center Street north on West 11th street to School street, Thence west on School street to 12th St. Thence north on 12th street to North Street and said company is authorized to use Tee rail until said streets are paved, Provided that there shall be but a single track of said road on 11th St. This grant is to be void unless said road is built and in operation by September 1st, 1889.

On motion of Ald. Morris Adopted—On roll call as follows—Yeas—Bolton, Drady, Hammer, Morris, Reynolds, Sheldon, Smith & Weitz (8) Nays (none) Absent—Macy—1.

Before approval by the Mayor the foregoing resolution was endorsed as follows—

We have the right to the exclusive use of the above named streets.
(Sgd.) R. N. BAYLIES, *Prest.*

Approved by the mayor.

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1145 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1146 EXHIBIT No. 84. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 574, May 28, 1889.

Ald. Bolton offered the following—

Be it resolved by the City Council of the city of Des Moines—That consent, permission and authority *is* hereby given to and vested in the Des Moines Electric Railway Company its successors and assigns to construct, equip and operate a line of its street railway along Cottage Grove Avenue from 21st st. to 24th street, and on 24th street to Atkins st. also on 21st st. from Center street to Cottage Grove Avenue—Provided that but one track shall be laid on Cottage Grove Avenue and that on the north side of the horse car track, and not less than five feet north of the same.

The company is authorized to use a Tee Rail, until said streets are paved—

On motion Resolution adopted on roll call Yeas—Bolton, Drady, Hammer, Morris, Reynolds, Sheldon, Smith & Weitz (8) Absent Macy—1.

The Des Moines Electric Railway Company made the following waiver to said resolution—viz—The Des Moines Electric Railway Company hereby waives all claims to an exclusive right under the above resolution.

(Sgd.) DES MOINES ELECTRIC RAILWAY CO.,
By R. N. BAYLIES, *Prest.*

Approved by the Mayor, Wm. L. Carpenter.

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1147 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1148 EXHIBIT No. 85. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 114 and 115, September 5th, 1889.

Ald. Weitz offered the following:

Whereas negotiations are now pending for the consolidation of the different street railroad companies in the City of Des Moines, and it is believed that the general welfare of the City will be promoted by such consolidation. Therefore, as an inducement to such consolidation, be it Resolved—That in the event of such consolidation, taking place, between the Des Moines Street Railway Company and the Des Moines Electric Street Railway Company, and the Des Moines Sevastopol Street Railway Company, so that said consolidated road shall be operated under one management, the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter on condition that the Des Moines Street Railroad Company will dismiss its suit against the City of Des Moines & the Des Moines Broad Guage Street Ry. Co. for damages growing out of the granting of certain franchises to the Des Moines Broad Guage Railway Company, and the Des Moines Electric Railway Company, and in such event the matters of controversy between said several parties in said suits, shall be regarded as fully and finally settled.

Provided that the company owning or operating such consolidated road shall accept such modification of existing franchises as will require it within a reasonable time not exceeding twelve months to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart, nor shall any tracks now being operated be taken up—unless by permission of the Council—and Provided further that not more than two tracks shall be laid upon any street & whenever tracks are laid they shall be so as to leave as much room on each side as is practicable;

1149 And such Company shall also accept such other reasonable rules & regulations relating to the construction and operation of the road as the safety and convenience of the people may require.

Resolution adopted on roll call as follows: Yeas—Drady, Hammer, Macy, Sheldon, & Weitz—5—Nays, Bolton, Reynolds, Smith (3).

Approved by the Mayor.

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1150 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1151 EXHIBIT No. 86. J. F. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 118 and 119, September 5th, 1889.

Ald. Weitz offered the following—

Whereas, Negotiations are now pending for the consolidation of the different Street Railroad Companies in the City of Des Moines, and it is believed that the general welfare of the City will be promoted by such consolidation, therefore, as an inducement to such consolidation—Be it Resolved

That in the event of such consolidation taking place between the Des Moines Street Railroad Company—The Des Moines Electric Street Railway Company and the Des Moines Sevastopol Street Railway Company, so that said consolidated roads shall be operated under one management the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter, on condition that the Des Moines Street Railroad Company will dismiss its suit against the City of Des Moines and the Des Moines Broad Guage Street Railway Company for damages growing out of the granting of certain franchises to the Des Moines Broad Guage Railway Company and the Des Moines Electric Railway Company, and in such event the matters in controversy between said several parties in said suit shall be regarded as fully and finally settled.

Provided, That the company owning or operating such consolidated roads shall accept such modifications of existing franchises as will require it within a reasonable time not exceeding twelve months to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart—nor shall any tracks now being operated be taken up unless by permission of the Council and provided further,

That not more than two tracks shall be laid upon any street and whenever tracks are laid they shall be laid so as to leave as much room on either side as is practicable and such company shall also accept such other reasonable rules and regulations relating to
1152 the construction and operation of the road as the safety and convenience of the people may require.

Adopted on roll call as follows, Yeas—Drady, Hammer, Macy, Sheldon & Weitz—5—

Approved by the Mayor.

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1153 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1154 EXHIBIT No. 87. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Pages 119 & 120, Sept. 5th, 1889.

Ald. Weitz offered the following.

Whereas, negotiations are now pending for a consolidation of the different street railway companies, of the City, and it is believed that the general welfare of the City will be promoted by such consolidation therefore as an inducement to said consolidation be it resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines Sevastopol Street Railroad Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railroad now or hereafter constructed by electricity or other practical motive power.

This resolution shall not however be construed as authorizing the use of steam motors for propelling said company's cars.

Adopted on roll call as follows: Yeas, Brady, Hammer, Macy, Sheldon & Weitz (5) Nays Bolton, Reynolds & Smith (3)

Approved by the Mayor.

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1155 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1156 EXHIBIT No. 88. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Pages 124 & 125, September 10th, 1889.

The following communication was received & read—

To the Hon. Mayor and City Council of Des Moines, Iowa:

Whereas, on the 5th day of Sept. 1889—Your Honorable Body passed certain resolutions concerning the consolidation, of certain Street Railway lines, and granting certain rights and privileges to the consolidated company, and exacting certain duties in consideration thereof; and, Whereas, said Street Railway Lines are to be consolidated under the corporate name of the Des Moines Street Railroad Company; and immediately upon the passage and approval of said resolutions, contracts were entered into between said company to that end, and a part of the purchase price for said property was thereupon paid,

Now, therefore, the undersigned, the said consolidated Railroad Company, upon the condition that said consolidation be full- effectuated as in said resolution stated, hereby accepts of the provisions and requirements of said resolutions and each of them and will proceed accordingly.

DES MOINES ST. R. R. CO.,
By W. M. McCAIN, *Pres.*
FRANK A. SHERMAN, *Sec'y.*

Accepted and ordered spread on the record & then to be filed.

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1157 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1158 EXHIBIT No. 89. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Bill of Sale.

This indenture made and entered into on the first day of October A. D. 1889 by and between the Des Moines Electric Railway Company, a corporation duly incorporated under the laws of the State of Iowa, of Polk County, Iowa, of the first part, and the Des Moines Street Railroad Company, a corporation duly incorporated under the laws of the State of Iowa of Polk County of the second part,

Witnesseth: That the party of the first part being thereunto duly authorized by a meeting of its stockholders duly called and held on the 27th day of September, 1889, and in further pursuance of a written offer to sell, made by its Board of Directors to J. McM. Smith, August 15th, 1889, accepted and subsequently assigned to the party of the second part; and in further consideration of the sum of Three Hundred and Forty Thousand Dollars in hand paid by the party of the second part, has sold and by these presents does sell, convey assign and set over to the party of the second part all the following described property situated in the County of Polk, State of Iowa, to-wit:

All the Street Railway's railway tracks, pavement, railroad iron, cars, engines, boilers, machinery, poles, wires, motors, motor trucks, electric dynamos, leases, contracts, choses in action, and all other property both real and personal, including all franchises, rights and privileges granted to the party of the first part or to the Des Moines Broad Guage Street Railway Company by the City of Des Moines, The towns of North Des Moines, University Place and Polk County,

and all other rights, privileges and property owned or
1159 claimed by the party of the first part on the first day of June, 1889, or subsequently acquired, whether herein specifically described or not, and including the good will of said

companies; reserving, however, from the operation of this conveyance all the receipts and earnings of said party of the first part prior to this date, from any and all sources, and also reserving from the operation of this conveyance all subsidies and subscriptions and donations of every kind and character (excepting Lot at 23rd and Clark Streets in North Des Moines, crossed by the track of said Company) heretofore made to party of the first part, whether collected or not; said property so reserved to remain the property of party of the first part with the same effect as though this conveyance had not been made.

And the party of the first part hereby covenants and agrees with the party of the second part that the property above conveyed and intended to be conveyed, is free and clear of all liens and incumbrances whatsoever, excepting a deed of trust executed by it to the International Trust Company of Boston, Massachusetts, Trustee therein named, dated August 1st, 1888, to secure a series of one hundred bonds of One Thousand Dollars ($1,000) each bearing 7 per cent. interest, payable semi-annually, as evidenced by coupons attached, with the right to issue additional bonds as provided in said deed of trust, sixty only of which bonds have been certified by the Trustee, and Sixty bonds only actually issued, and the party of second part herein assumes the payment of fifty of said bonds so issued and agrees to pay the same and interest from this date, as part of the consideration above expressed, and subject to the above incumbrances and also subject to the obligation to pay for
1160 five feet of the paving between tracks of said roads laid during the season of 1889, which the grantee also assumes and agrees to pay in addition to the expressed consideration.

The party of the first part covenants to warrant and defend the property herein conveyed, against the lawful claims of any and all persons whomsoever except as against encumbrances above referred to. And the party of the first part agrees that it will not again engage in the business of transporting passengers, within Polk County, Iowa, either by horse, electric or any other power, and will not again engage in said business in any way. And it will refrain from all operations by electric force or power in said city.

In witness whereof, the party of the first part has caused its name to be signed hereunto and its seal affixed by its President, and attested by its Secretary, the day and year above stated.

[SEAL.] DES MOINES ELECTRIC RAILWAY COMPANY,
By R. N. BAYLIES, *Pres't.*
By H. E. TEACHOUT, *Sec'y.*

1161 STATE OF IOWA, *Polk County, ss:*

Be it remembered that on this 1st day of October A. D., 1889, before me, O. S. Baylies a Notary Public within and for said County and State, personally appeared R. N. Baylies and H. E. Teachout, personally to me known to be the identical persons whose names are affixed to the foregoing instrument as president and secretary respectively of the Des Moines Electric Railway Company, the grantor

in the foregoing instrument, and personally to me known also to be such officers, and severally acknowledged the foregoing instrument and the execution thereof to be the voluntary act and deed of the said company by themselves as such officers thereunto appointed and duly authorized, voluntarily done and executed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal at the city of Des Moines in said county on the day and year last above written.

[SEAL.] O. S. BAYLIES,
Notary Public in and for
Polk County, Iowa.

Endorsed on the back as follows: "Polk County, Iowa, Filed for record Oct. 1, 1889, at 4:50 o'clock P. M. and recorded in Book 233, Page 65," Paid.

GEO. C. SIMS, *Recorder.*

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1162 EXHIBIT No. 90. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents:

That the Des Moines Electric Railway Company, a corporation organized under the laws of Iowa, doing business in Polk County and State of Iowa, in consideration of the sum of Ten Thousand dollars, in hand paid by the Des Moines Street Railroad Company, a corporation of Polk County, and State of Iowa, do hereby sell and convey unto the said Des Moines Street Railroad Company, the following described premises, situated in the County of Polk and State of Iowa, to-wit:—

Lots numbered twenty seven (27) and twenty-eight (28) in block forty-five (45) Stewart's Addition to the City of Des Moines now included within the corporate limits of said city, and lot one (1) Block one (1) of Marquardt's Addition to the town of North Des Moines, now included within the corporate limits of said town.

And we hereby covenant with the said Des Moines Street Railroad Company that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same, that they are free and clear of all liens and encumbrances whatsoever, excepting a deed of trust, executed by it to the International Trust Company of Boston, Massachusetts, trustee therein named, dated August 1st, 1888, to secure a series of one hundred bonds of $1000 each, bearing 7 per cent. interest, payable semi-annually, as evidenced by coupons attached, with the right to issue additional bonds, as provided in said deed of trust, sixty only of which bonds have been certified by the trustee, and Sixty (ten of which are paid) bonds only have been actually issued. And the

said Des Moines Street Railroad Company assumes the said remaining Fifty bonds so issued and agrees to pay the same with interest from this date, as part of the whole consideration for the property above described and other property this day conveyed to it by the Des Moines Electric Railway Company. And also subject
1163 to the obligation to pay for the five feet of paving between tracks of the railway this day conveyed, laid during the season of 1889, subsequent to June 1st, which the said grantee also assumes and agrees to pay in addition to said consideration.

And we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, excepting the incumbrances above described.

This deed of conveyance is executed pursuant to authority given by the stockholders of the grantor company at a meeting thereof held on the 27th day of September, 1889, and pursuant to a resolution of the Board of Directors of said Company held on the same day authorizing and directing the execution and delivery hereof.

In witness whereof, the Des Moines Electric Railway Company has caused the presents to be signed by its president and attested by its secretary, and affixed hereunto its corporate seal this 1st day of October, 1889.

[SEAL.] DES MOINES ELECTRIC RY. CO.
By R. N. BAYLIES, *Pres't.*
By H. E. TEACHOUT, *Sec'y.*

1164 STATE OF IOWA, *Polk County, ss:*

Be it remembered that on this 1st day of October, A. D. 1889, before me, O. S. Baylies a Notary Public within and for said County and State, personally appeared R. N. Baylies and H. E. Teachout personally to me known to be the identical persons whose names are affixed to the foregoing instrument as president and secretary, respectively, of the Des Moines Electric Railway Company, the grantor in the foregoing instrument, and personally to me known also to be such officers, and severally acknowledged the foregoing instrument and the execution thereof to be the voluntary act and deed of the said company by themselves as such officers thereunto appointed and duly authorized, voluntarily done and executed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal at the city of Des Moines in said County, on the day and year last above written.

[SEAL.] O. S. BAYLIES,
Notary Public in and for Polk County, Iowa.

Endorsed on the back as follows:

Polk County, Iowa—Filed for Record—Oct. 1, 1889 at 4:52 o'clock P. M. and Recorded in Book 226 Page 214. Paid. Geo. C. Sims Recorder.

(Endorsed:) Filed Sep. 15, 1903. E. R. Mason, Clerk.

1165 EXHIBIT No. 91. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the construction and operation of street railroads in South Des Moines, along and across the streets and alleys therein.

O. 294. P. November 19, 1883.

SECTION 1. Be it ordained by the city council of the city of Des Moines: That consent, permission and authority is hereby given and granted to and vested in the Des Moines & Sevastopol Railway Company, and its successors and assigns to construct, equip and maintain and operate for the term of thirty years upon the conditions hereinafter stated, a single or double street railway track along such streets and alleys as said company may select in that part of the city of Des Moines lying south of the Raccoon river and east of the Des Moines river, and on Seventh street from the South side of Raccoon river over and along Seventh street bridge, and along Seventh street to Elm street in West Des Moines, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side tracks and switches along the streets, and such alleys only fronting on which said company shall have depots, stables or car houses.

SEC. 2. The cars used on said tracks shall be operated with animal power only.

SEC. 3. The tracks of said railway shall be laid so as to conform to the surface of the streets as the same is, or shall be, established by the city, and shall conform to the established grades of the streets wherever the same are established and brought to grade by the city, and in case the city shall at any time pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve the space between the rails of their track so that it shall substantially correspond with the improvement of the street outside of the track. And said company shall also in like manner pave and keep in repair any space outside of the rails on which the horses of said company may travel, and said company shall plank a space between the tracks on each
1166 principal street crossing whenever required by the Street Committee.

SEC. 4. The city of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or for any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement or repair of any street.

SEC. 5. Said Tracks shall be laid in the center of the streets in all cases where it is practicable to lay them, and except where a

double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along any alley a single track only shall be laid, and no tracks, switches or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed upon any such alleys; provided, however, that if said company shall have its depot, stations, stables or car houses on any lot fronting on such alleys they shall have the privilege of laying down and maintaining turn-out tracks leading from such alleys into such depots, stations, stables or car houses.

SEC. 6. The rate of fare, for one person, upon any one line or route of railway, or for any distance within the corporate limits of the city of Des Moines, shall not exceed five cents.

SEC. 7. The cars of said company shall be entitled to the track; and in all cases where any team or vehicle shall meet or be overtaken by the cars on said railway, such team or vehicle shall give way to such car; nor shall any person willfully or maliciously obstruct hinder or interfere with any of said railway cars, by placing, driving or stopping or causing to be placed or driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across
1167 along or near the track of said railway, or either of them, after being notified by the driver or conductor, by the ringing of the car bell or otherwise; and whoever shall willfully violate any of the provisions of this section, shall, upon conviction before the Police Judge of said city, be fined any sum not less than five dollars nor to exceed fifty dollars.

SEC. 8. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations to-wit:

First. No car shall run at a greater rate of speed than six miles an hour.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. No car shall be allowed to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or other proper purposes.

Fourth. No car shall be allowed to stop on any cross walk or in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street, or to take on or leave off passengers.

Fifth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one on or near the track, the car shall be stopped when by so doing such injury may be averted.

Sixth. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Seventh. The conductors shall use proper diligence to prevent ladies, and children under twelve years of age, from leaving the car while in motion.

Eighth. Conductors shall announce to passengers in a dis-
1168 tinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company.

Ninth. The cars after sunset shall be provided with signal lights.

Tenth. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses, and at each end of the line, and at the stations nearest the passenger depots of other railway companies, at which excepted stations they may stand a longer time.

Eleventh. When cars are driven in the same direction along the same track, the horses or mules attached to one car shall not approach nearer than two hundred feet to the car in front of them, except in cases of unavoidable meeting or accident, or when cars are near to stations.

SEC. 9. This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit:

The said company shall have at least one mile of said road completed and equipped and cars running thereon by the first day of September, 1885; that said Des Moines and Sevastopol Street Railway Company is hereby granted the right and privilege to use what is known as the Raccoon Point Bridge upon which to run its road across the Raccoon river; provided, that said ordinance shall be amended further so that the levee on Jefferson street in said south Des Moines shall be excepted from the right to use all the streets in said South Des Moines from Second street south to the bluffs.

Provided, however, that if they shall be unavoidably delayed in the completion of said mile of railway, within the time specified, by reason of injunction or otherwise, the time of such delay shall not be computed, and the time for the completion of said mile of railway shall be added to and extended beyond the date above designated.

Sec. 9 is 0.328. P. August 24, 1885.

SEC. 10. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written accept-
1169 ance of the grants herein made with the condition, regulations and limitations above expressed, signed by the President and Secretary of said company, and upon failure to file such acceptance as aforesaid then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

SEC. 11. Provided, that nothing herein contained shall in any manner whatsoever be construed to hold the city of Des Moines responsible to said Street Railway Company for any delay or damage claimed for any time used in repairing Seventh street bridge or replacing the same in the event of said bridge being washed out or

worn out during the continuance of and the acceptance of this ordinance and shall be an acknowledgment of said Street Railway Company that the city shall be held harmless as above provided.

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1170 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1171 EXHIBIT No. 92. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.,
vs.
CITY OF DES MOINES.

Book K, Page 302, January 7, 1884.

The following was presented and on motion of Ald. King was placed on record. "The Des Moines and Sevastopol Street Railway Company hereby accepts the ordinance passed by the City Council on the 19th day of November, 1883, and published November 21, 1883, entitled "An ordinance authorizing the construction and operation of Street Railroads in South Des Moines, along and across the streets and alleys therein" and the grants therein made with the conditions regulations and limitations expressed in said ordinance.

In witness whereof the president and secretary of the said Des Moines & Sevastopol Street Railway Company have hereunto signed their names this 18th day of December, 1883.

(Sgd.) G. VAN GINKEL, *President.*
JOHN BECKWITH, *Secretary.*
DES MOINES & SEVASTOPOL STREET RAILWAY CO.

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1172 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1173 EXHIBIT No. 93. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the construction and operation of street railways in Sevastopol, Polk County, Iowa, along and across the streets and alleys therein.

Be it ordained by the town council of the town of Sevastopol:

SECTION 1. That consent, permission and authority is hereby given, granted and vested in the Des Moines and Sevastopol Railway Company, and its successors and assigns, to construct, equip, maintain and operate for the term of thirty-five (35) years, upon the con-

ditions hereinafter stated, a single or double street railway track along such streets and alleys as the company may select in the town of Sevastopol, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks, and switches along the streets and such alleys only fronting on which said company shall have depots, stables, or car-houses; but if ever this company shall deem it necessary to lay a double track they shall report to the town clerk for the council to stipulate such time as the work shall have to be done, but such time shall be no less than thirty days.

SEC. 2. The cars used on said track shall be operated with animal power only.

SEC. 3. The track of said street railway shall be laid so as to conform to the surface of the street and according to the grade established or to be established by the town of Sevastopol and said company shall plank a space between the tracks on each principal street crossing whenever required by the street committee. But the town of Sevastopol reserves its right to grade streets and alleys whenever it sees proper to do so.

SEC. 4. The town of Sevastopol shall not be held liable to said company for any damage that may be occasioned by the
1174 breakage of any gas or water pipe, or from any delay that may be occasioned by laying sewers, laying of water or gas pipes, or for any delay that may be occasioned by the same or the necessary repairing of the same, or from the improvement or repair of any street.

SEC. 5. The track shall be laid in the center of the street in all cases where it is practicable to lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of such street as will make the center point between the two tracks the center of the street; and said track shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along any alley a single track only shall be laid, and no tracks, switches or turn outs except in cases where turnouts are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed upon any such alleys; provided, however, that if said company shall have its depots, stations, stables or car-houses on any lot fronting on such alley or street, they shall have the privilege of laying down and maintaining turnouts leading from such alleys or streets to such depots, stations, stables or car-houses.

SEC. 6. The fare for one person upon any one line or route of railway within extending into the city of Des Moines or lying wholly within the limits of Sevastopol, shall be five (5) cents; and said railway and their property and in operating the same shall be exempt from all municipal tax for the space of fifteen years.

SEC. 7. The cars of said company shall be entitled to the tracks, and in all cases where any team shall meet or be overtaken by the cars of said street railway such team or vehicle shall give way to

such car; nor shall any person wilfully or maliciously ob-
1175 struct, hinder or interfere with any of said street railway cars by placing driving or stopping or causing to be placed, or driving in a slow pace, or stopped, any team, vehicle or any other obstacle in, upon, across, along or near the track of said street railway, or either of them, after being notified by the driver or conductor by ringing of the car bell or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction before the mayor or other officer of said town, be fined any sum not less than one (1) dollar nor to exceed fifty dollars.

SEC. 8. The cars or carriages of the company shall be run upon and along the tracks of said company in conformity with the following rules and regulations, to-wit:

Rule 1. No car shall be run at a greater rate of speed than six (6) miles an hour.

Rule 2. While cars are turning corners from one street to another the horses or mules attached thereto shall not be driven faster than a walk.

Rule 3. No cars shall be left to remain standing on any street at any time unless a team is attached thereto and the same is waiting for passengers or other proper purposes.

Rule 4. No car shall be allowed to stop on any cross-walk or in front of any intersecting street except to avoid collision or to prevent danger to persons in the street, or to take on or leave off passengers.

Rule 5. The conductors or drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the car shall be stopped when by so doing injury may be averted.

1176 Rule 6. All proper care shall be used by conductors or drivers to prevent injury to teams, carriages wagons and other vehicles.

Rule 7. The cars after sunset shall be provided with signal lights.

Rule 8. The conductors shall use proper diligence to prevent ladies, and children under twelve years of age, from leaving the cars while in motion.

Rule 9. No car shall be left standing on the track more than fifteen minutes except for watering purposes.

SEC. 9. This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications, to-wit: The said company shall have at least one-half mile of said road completed and equipped and cars running in ninety days from date provided, however, that if they shall be unavoidably delayed by injunction or otherwise, the time of such delay shall not be commuted, and the time for completion of said half mile of railway shall be added to and extended beyond the date above designated.

SEC. 10. Within thirty days from the publication of this ordinance said company shall file with the town clerk a written acceptance of the grant herein made, with the conditions, regulations and limitations above expressed signed by the president and secre-

tary of said company, and upon failure to file such acceptance as aforesaid then the grant shall not become operative to vest any rights privileges or franchises whatever.

SEC. 11. Provided that nothing herein contained shall in any manner whatsoever be construed to hold the town of Sevastopol responsible to said street railway company for any delay or damage claimed for any time used in repairing streets, bridges, or digging of ditches.

1177 & 1178 SEC. 12. This ordinance shall take effect and be in force on and after its passage and publication according to law.

Passed Sevastopol, Polk County, Iowa, August 10, A. D. 1885.

STATE OF IOWA, *Polk County, ss:*

I, J. D. Laws, do solemnly swear that I am the town recorder of the incorporated town of Sevastopol, in the county of Polk and state of Iowa, and that as such recorder I have in my possession all the records of the proceedings of the town council of said town, and that I have carefully examined said records, and that the ordinances and proceedings in reference to the Des Moines Sevastopol Street Railway Company hereunto attached and known as No. 15, are all the ordinances of said town council relating to said street railway company from the organization of said town to the 26th day of August, 1889.

J. D. LAWS.

Subscribed and sworn to before me this 26th day of August, 1889.
[SEAL.] A. N. PORTER,
Notary Public, Polk Co., Iowa.

TOWN HALL OF SEVASTOPOL, *August* 24, 1889.

I, J. D. Laws, recorder of said town do hereby certify that the within instrument is a true and correct copy of ordinance No. 15 of the ordinances of said town, which is the only ordinance on the subject of street railroads, or pertaining to the subject in the book of ordinances of said town, and that said ordinance has never been repealed or amended, but is now in full force and effect.

[SEAL.] J. D. LAWS,
Town Recorder of Sevastopol.

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1179 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1180 EXHIBIT No. 94. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 328.

An ordinance to amend section number nine (9) of ordinance No. 294, being an ordinance entitled an ordinance authorizing the construction and operation of street railroads in South Des Moines along and across the streets and alleys therein.

SECTION FIRST. Be it ordained by the city council of the City of Des Moines that Section Nine (9) of the above entitled ordinance No. 294 be and the same is hereby amended as herein provided.

SECTION 2D. That the following words and figures of said section be stricken out, to-wit: the 4th day of July 1885, and insert the following words and figures, namely: "The first day of September 1885."

SECTION 3D. That said Des Moines and Sevastopol Street Railway Company is hereby granted the privilege to use what is known as the "Coon Point Bridge" upon which to run its road across the Raccoon River, Provided that ordinance shall be amended further so that the levee on Jefferson Street in said South Des Moines shall be excepted from the rights to use all the streets in said South Des Moines from Second Street south to the Bluffs.

Passed August 24, 1885. Approved August 24, 1885.

—— ——, *Mayor.*

Published August 25, 1885.
Attest:

—— ——, *City Clerk.*

I, W. D. Christy, City Clerk of the City of Des Moines, do hereby certify that the foregoing ordinance was passed at a meeting of the City Council held August 24, 1885, and that the same was published in the Des Moines Daily Register August 25, 1885.

—— ——, *City Clerk.*

* * * * * * *

1181 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1182 EXHIBIT No. 95. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Bill of Sale.

This Indenture: Made and entered into on the first day of October A. D. 1889, by and between the *Des Moines & Sevastopol Street Railway Company*, a corporation duly incorporated under the laws of the State of Iowa, of Polk County, Iowa, of the first part, and the *Des Moines Street Railroad Company*, a corporation duly incorporated under the laws of the State of Iowa of Polk County, Iowa, of the second part,

Witnesseth: That the party of the first part, being thereunto duly authorized by a meeting of its stockholders, duly called and held on the 27th day of September, 1889, and in further pursuance of a written offer to sell, made by its Board of Directors, to J. McM. Smith August 15th, 1889, accepted and subsequently assigned to the party of the second part, and in further consideration of Ten Thousand Dollars in hand paid by the party of the second part, and the further consideration of (1610) shares of one hundred dollars each, of the full paid common stock of the Des Moines Street Railroad Company, paid by the second party, has sold and by these presents does sell, convey, assign and set over to the party of the second part all the following described property situate in the County of Polk, State of Iowa, to-wit:

All, the street railways, railways tracks, right of way, railroad iron, cars, choses in action, and all other property, including all franchises, rights and privileges granted to the party of the first part by the City of Des Moines, and the incorporated Town of
1183 Sevastopol, and all other rights, privileges and property, including the good will of said company, reserving, however, from the operation of this conveyance, all of the receipts and earnings of said party of the first part, prior to this date, from any and all sources, and the following real estate, to-wit: Lots Ten (10) Eleven (11) and Twelve (12) Van Ginkel's Addistion to Town of Sevastopol.

And the party of the first part hereby covenants and agrees with the party of the second part that the property above conveyed is free and clear of all liens and incumbrances whatsoever.

The party of the first part covenants to warrant and defend the property herein conveyed against the lawful claims of any and all persons whomsoever. And the party of the first part agrees that it will not again engage in the business of transporting passengers in Polk County, Iowa.

In Witness Whereof, the party of the first part has caused its

name to be signed hereunto, and its seal affixed by its President, and attested by its Secretary the day and year above stated.

[SEAL.] DES MOINES & SEVASTOPOL ST. RY. CO.,
By G. VAN GINKEL, *Pres.*,
By G. C. VAN GINKEL, *Sec'y.*

1184 STATE OF IOWA, *Polk County, ss:*

Be it remembered that on this 1st day of October A. D. 1889, before me O. S. Baylies, a Notary public within and for said County and State, personally appeared G. Van Ginkel and G. C. Van Ginkel, personally to me known to be the identical persons whose names are affixed to the foregoing instrument, as President and Secretary, respectively, of the Des Moines and Sevastopol Street Railway Company, the grantor in the foregoing instrument, and personally to me known also to be such officers, and severally acknowledged the foregoing instrument and the execution thereof to be the voluntary act and deed of the said Company by themselves as such officers, thereunto appointed and duly authorized voluntarily done and executed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal at the city of Des Moines in said county on the day and year last above written.

[SEAL.] O. S. BAYLIES,
Notary Public in and for Polk County, Iowa.

Endorsed on the back as follows: Polk County, Iowa, Filed for Record Oct. 1, 1889, at 4:55 o'clock P. M. and Recorded in Book 233, Page, 68. George C. Sims, Recorder. Paid.

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1185 EXHIBIT No. 96. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Pages 211 & 212, December 4th, 1889.

Protest of citizens on W. Locust St. against removing Electric St. Ry. tracks from Locust St. Referred to committee on Streets & Alleys & Solicitor— Above petition is as follows— viz—

To the Honorable Mayor & City Council of the City of Des Moines, Iowa:

We the undersigned residents, and property holders on Locust St. from West Twelfth St. to the Capital, learning that some objections had been made to the further prosecution of the work on the street railway track on said street, would respectfully petition your Honor-

able Body not to stop said work thereon, or permit said street to be abandoned by the Street Railway Co. We feel that a single track should be maintained on said street from 12th street to Fourth St., and that a double track should be maintained on said street from Fourth St. to Capitol, and operated by electricity, and that the removal of the said tracks from said street and the stopping of the running of the cars thereon, would be very detrimental both to the street and the property owners thereon and the citizens of Des Moines at large—

(Sgd.)

G. W. MARQUARDT.	FRANK RISELY.
WM. PHILLIPS.	THOS. BAIRD.
E. B. WHITCOMB.	J. W. CRAMPTON.
READHEAD, NORTON & LATHROP CO.	C. J. SHAKLEFORD.
JOHN TROSTEL.	WESLEY REDHEAD.
FAYETTE MEEK.	H. R. LOVE.
BELKNAPP ART CO.	C. YOUNGERMAN.
H. C. HARRIS & CO.	MARTIN TUTTLE.
E. R. CLAPP.	CHAS. P. VORSE.
MARTIN FLYNN.	F. M. HUBBELL.

1186 Papers delivered to Mayor.

Referred to Committee on Ways & Means—Judiciary Committee & Solicitor.

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1187 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1188 EXHIBIT No. 97. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

An ordinance authorizing the Des Moines Street Railroad Company to equip its Ninth Street line and other lines it may hereafter receive authority to build, electrically, and to operate the same by electricity.

Be it ordained by the Town Council of the town of North Des Moines:

SECTION 1. The Des Moines Street Railroad Company is hereby authorized to reconstruct its railway now built and operated on Ninth Street, of the town of North Des Moines, and equip the same electrically, as well as such other roads as it may hereafter receive authority from the town council of North Des Moines by resolution or ordinance to build, and when so equipped it is authorized to operate its said roads with electricity as hereinafter provided.

SECTION 2. Such equipment of said company's roads, both as to the overhead construction and the cars used thereon, shall be well

and substantially built, and shall be similar to that used by said company on its lines in the streets of Des Moines, and the same when so equipped shall be operated under such reasonable rules as the town council may prescribe for the safety of the public and the patrons of said roads.

SECTION 3. In consideration of the rights and privileges herein granted, the Des Moines Street Railroad Company, it is expressly agreed by said company that however the original (ordinance) may be construed one fare of not to exceed five cents shall pay transportation for any one person over the entire route one way.

SECTION 4. Within thirty days from the passage of this ordinance and its publication as required by law said company shall accept the provisions thereof and file a notice of such acceptance with the town clerk, and, if not so accepted, the same shall be void.

1189 SECTION 5. This ordinance shall take effect from and after its passage and publication as provided by law, and such publication shall be at the expense of said company.

The above ordinance was adopted by unanimous vote of the council January 20, 1890.

JOHN McVICAR, *Mayor.*
W. B. THOMPKINS, *Recorder.*

I hereby certify that the above is a true and correct copy of the records as they appear.

W. B. THOMPKINS,
Recorder, North Des Moines.

* * * * * * *

1190 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1191 EXHIBIT No. 98. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 245, January 29th, 1890.

Ald. Smith presented the following petition which was received, read, spread on the Record & filed.

To the Hon. Mayor and City Council of the City of Des Moines, Iowa.

GENTLEMEN: We the undersigned residents and property owners on East Fifth St. from Court Ave. south to Scott St. and on Scott St. easterly, would respectfully petition your Honorable Body to Take such steps as in your judgment may seem best to have a street railway track laid and operated on said streets.

(Sgd.) T. J. CARROLL AND FORTY-FIVE (45) OTHERS.

Ald. Smith presented the following resolution which was read and adopted—Be it Resolved by the City Council of the City of Des Moines, That the Des Moines Street Railway Co. be and it is hereby ordered to construct and operate a line of street railway—commencing at a point on East 5th & Walnut—thence north on 5th street to Scott—easterly on Scott to 18th, south on 18th to Maury—east on Maury to corporation line. The track to be laid under the supervision of the City Engineer and in accordance with the ordinances of the City, Approved by the Mayor.

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1192 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1193 EXHIBIT No. 99. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 256, February 6, 1890.

Ald. Macy offered the following resolution—

Whereas the Des Moines Street Railroad Company proposes to extend its South Coon & Sevastopol line from its present terminus near the mouth of the Raccoon river, to a connection with its other lines on Court Avenue at or near the Postoffice, for the accommodation of persons residing and doing business in South Des Moines, and Sevastopol.

Now therefore, Be it Resolved—That said Railroad Company in extending its lines as above proposed is hereby authorized to lay its tracks from the north end of the Raccoon Bridge on, and along 1st St. to Court Avenue, thence west on Court Ave. to a connection with its tracks at or near the Postoffice, and in laying its tracks on 1st St. it is authorized to lay the same on the east side of said street, if possible—

Commencing at the north end of the bridge of the Raccoon River and running thence by a practical curve to a point one hundred (100) feet north, and fifty (50) feet east of the north-west corner of Elm & Water Sts. and from the west line of Water St. to the south line of Court Avenue. And said company is authorized to grade up its track on 1st St. so as to procure an easy crossing of the several railways, which cross said street, provided such work shall be done under the supervision of the City Engineer, and said company after it shall grade up its track on the east side of 1st St., shall put in good and sufficient water-ways under its road at such points as the

1194 City Engineer may designate—and when said 1st St. shall be paved said company will at its own expense, put in the curbing on the east side of said 1st St. in front of, and along its road from Court Ave. to Elm St. And in case it is practical to use only one line of poles on Front St., said company to use one line only.

On motion the foregoing Resolution was adopted on roll call, as follows—Yeas, Drady, Hammer, Macy, Reynolds, Sheldon, Smith & Weitz—7. Nays, none. Approved by the Mayor.

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1195–1197 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

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1198 VOLUME IV. E. R. MASON, CLERK.

The Complainant to maintain the issues upon its part introduced in evidence Exhibits following which Exhibits were in words and figures as follows, to-wit:

1199 U. S. Circuit Court, Southern Dist. Iowa.

DES MOINES CITY RAILWAY COMPANY
vs.
CITY OF DES MOINES.

PLAINTIFF'S ORIGINAL EXHIBITS No. 100 TO No. 230 (except # 224).

VOL. "2."

1200 EXHIBIT No. 100. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 274, February 28th, 1890.

Ald. Reynolds offered the following:

Resolved, That the Des Moines Street Railway Company be and it is hereby authorized when it widens out its track on East Ninth Street to rebuild & maintain the same on the west *said-* of said street until said street is sewered and the same shall be paved, and when so paved the said track shall be removed to the middle of said street in accordance with the provisions of the ordinance heretofore granted said Company.

On Motion adopted unanimously and Approved by the Mayor.

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1201 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1202 EXHIBIT No. 101. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 280, March 8th, 1890.

An ordinance amending ordinance No. 63 (Being Chapter fifty-three revised ordinances of 1889)—entitled "An ordinance authorizing the construction and operation of certain street railways in and along the streets of the City of Des Moines, passed December the 10th, 1886."

Was read a 1st time—On motion the rule was suspended on roll call as follows—Yeas Bolton, Drady, Hammer, Macy, Morris, Reynolds, Sheldon, Smith & Weitz—9—Nays none.

The ordinance was then read a 2d time—On motion the rule was again suspended on Roll call as follows—Yeas—Bolton, Drady, Hammer, Macy, Morris, Reynolds, Sheldon, Smith & Weitz—9—Nays none.

The ordinance was read a 3d time & placed upon its final passage, and on the question shall the ordinance now pass the Yeas were as follows—Drady, Macy, Morris, Sheldon, Smith, & Weitz—6—Nays Bolton, Hammer & Reynolds—3—So the ordinance was passed and title agreed to.

Approved by the Mayor.

* * * * * * *

1203 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1204 EXHIBIT No. 102. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

"An ordinance amending ordinance No. 53, entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, passed December 10th, 1886."

SECTION 1. Be it ordained by the City Council of the City of Des Moines that Section 2 of said ordinance, be, and the same is amended so as to read as follows, to-wit,—

"SECTION 2. The cars to be used upon the railway tracks constructed under, and in pursuance of this ordinance or acquired by said company or its assigns, or that —— hereafter may be constructed or acquired, shall be operated by animal power, or by electricity, or other practical motor power:

Provided that hereafter in laying its tracks on parallel streets the same shall not be laid nearer together than two blocks, unless the city council shall consent thereto, nor shall any tracks of said company's road as now laid be removed without the consent of the city council, and provided further that no more than two tracks shall be laid upon any street and when tracks are laid they shall be laid so as to leave as much room on either side thereof as practical, and provided further that this amendment shall in no way be construed as authorizing the use of steam motors on said roads for propelling said company's cars, nor shall said company or its assigns, allow the use of its tracks for any other purpose than that of legitimate street railway traffic."

SECTION 2. That Section 7 of said ordinance be, and the same is hereby amended so as to read as follows:

"SECTION 7. The rate of fare upon any one line or route of said company's railway shall not exceed five cents, provided however that children under five years who are accompanied by
1205 their parents or nurse shall be carried free."

SECTION 3. That Rule "First" of Section 13 of said ordinance shall be amended so as to read as follows:

"First. No cars shall run at a greater rate of speed within the business portion of said city, than eight miles an hour nor shall the same be run in any other portion of said city at a greater rate of speed than twelve miles an hour."

Rule Eleventh of said Section 13, shall be amended by adding thereto the following words, "And said company shall also accept such other reasonable rules, and regulations for the construction, and operation of its roads as the safety and convenience of the people may require."

SECTION 4. This ordinance when accepted by the Des Moines Street Railroad Company shall be, and become a part of the Contract between it as the assignee of the Des Moines Street Railway Company, and the City of Des Moines. Provided the same shall be accepted in thirty days from the passage thereof.

SECTION 5. This ordinance shall take effect from, and after its publication as required by law, provided that such publication shall be at the expense of said Railroad Company.

Passed March 8th, 1890.

Attest:
I. A. HAMMER, *City Clerk.*

Approved:
WM. L. CARPENTER, *Mayor.*

Pub. Register March 9/90.
" Capital " 10/90.

* * * * * * *

1206 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1207 EXHIBIT No. 103. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 346, April 18, 1890.

Ald. Macy offered the following:

Resolved, That consent, is hereby given & granted to the Des Moines Street Railroad Company to build & operate a track of its Street railroad on West Tenth Street from School St. North to Clerkson St. & connect the same up with its West 9th Street track where it crosses said School & Clarkson Sts. This consent being given & granted under & in pursuance of ordinance No. 63, heretofore passed by this Council on the 10th day of December, 1886, being now Chapter 53 of the revised ordinances. The track so authorized by this resolutioir to be constructed shall be constructed & operated as provided in said ordinance & the amendments thereto. Approved by the Mayor, and adopted on roll call as follows:—Yeas Cunningham, Drady, Hammer, Reynolds, Rollins, Sheldon, Smith & Wells —9—Nays none.

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1208 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1209 EXHIBIT No. 104. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Acts of the Twenty-third General Assembly.

CHAPTER 11.

Street Railways.

An act conferring upon cities and incorporated towns certain additional powers relating to the construction of street railways and to define the motive power thereof.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways, within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal—electricity—steam or other power, whether now known or hereafter utilized.

SECTION 2. All ordinances or resolutions of such cities or incor-

porated towns heretofore enacted, granting to any person or company the right to propel its cars by electricity are hereby declared legal and valid. Provided that nothing in this act shall effect (affect) present or pending litigation or any vested rights.

SECTION 3. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and Des Moines Leader Newspapers published at Des Moines, Iowa.

Approved April 24, 1890.

I hereby certify that the foregoing act was published in the Iowa State Register April 30, 1890 and the Des Moines Leader April 29, 1890.

FRANK D. JACKSON,
Sec'y of State.

(Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1210 EXHIBIT No. 105. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page- 419 and 420, June 7, 1890.

Ald. Youngerman offered the following:

Resolved, That the Des Moines Street Railroad Company be and it is hereby authorized to lay down a single track of its road on West 5th Street from the north side of Walnut Street to the south side of Mulberry so as to connect its tracks on 5th Street & Mulberry and to operate the same under the provisions of ordinance of the City (Revised ordinances #53) heretofore passed on December 10th, 1866, and amendments thereto.

Adopted, Yeas—8—Nays None.

Approved, (Signed) J. H. CAMPBELL, *Mayor.*

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1211 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1212 EXHIBIT No. 106. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book P, Pages 115 & 116, April 20, 1891.

Ald. Tone offered the following:

Resolved, That the Board of Public Works be and they are authorized when in their judgment any of the un-used Narrow Gauge

Railway now in the streets so occupied, to order, the street railroad company to remove the same, and on failure of said Company to comply with said order within a reasonable time then the said Board is directed to cause the same to be removed and the costs thereof to be taxed up to the said Company Provided that a compliance of said company without the order of the Board shall in no way be construed as an abandonment of its rights on said streets or the right to rebuild or widen outs its tracks thereon.

On motion adopted by Yeas Barlow, Hussey, Reynolds, Rollins, Sheldon, Sherman, Tone—7—Nays none. Lane & Smith—2—not voting.

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1213 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1214 EXHIBIT No. 107. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book P, Page 271, July 27, 1891.

Petition of the D. M. St. Railroad Co. to be allowed to lay a double track on the Walnut St. Bridge and Ald. Tone moved to adopt the following provision.

Provided that before placing any tracks on said Walnut street bridge the Des Moines Street Railway Co. shall first pay into the City Treasury the cost of paving five ft. in width for each track—said cost to be assessed by the Board of Public Works and City Engineer and motion prevailed by Yeas (9) nine, Nays none. And motion to grant prayer of petitioneer with above provisions prevailed by yeas (9) Nine, Nays None.

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1215 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1216 EXHIBIT No. 108. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book P, Page 280, Aug. 3, 1891.

To the Honorable Mayor and City Council:

Your committee to whom was submitted the question of the paving of the Walnut street bridge by the Des Moines Street Railway Company beg leave to report as follows:—

We find upon investigation of this question that it is not free from difficulty. This is owing to the fact we believe that at the time the Ordinance was passed requiring street railways to pave two and one-half feet each way from the center of their tracks, bridges were not taken into consideration for the reason no doubt that no bridge then constructed had its floor paved. The present Walnut Street Bridge now in course of construction being the first bridge in the City upon which any paving has been ordered.

There has been a question raised in this matter whether or not the Street Railway has the right to operate its road on this bridge without permission from the City Council. This question was raised through a misapprehension no doubt of existing ordinances relating to these Street Railways.

On the 5th day of Sept. 1889, a resolution of consolidation of the Des Moines Electric & Sevastopol lines was at the City Council in which it was provided that the consolidated roads under one management should adjust its system within twelve months from the passage of the resolution referred to, that parallel streets should not be occupied by its tracks nearer than two blocks apart. If this resolution had not been modified, Walnut Street could not now be occupied while said company are operating its tracks on Locust street without permission from the City which permit might be subject to conditions.

Our attention however has been called to an ordinance passed by the City Council in the month of March, 1890, so modifying the resolution referred to as to only include streets not occupied by said Company at the time of the passage of the resolution.

1217 Walnut street had at that time a street railway in operation.

It will be seen therefore that this street railway company has the right under existing contracts to operate its road on Walnut street including the bridge thereon without asking permission from the City Council. This compels us to revert to the original question of the paving. In our judgment the street railway should pay for the paving on this bridge the same as on other portions of the street, this bridge being a part of the street and highway. While the laws and ordinances were passed with the view of taxing these railways to relieve abutting property and the formalities and mode of assessment being with that view and there being no private ownership to the bed of the river, the public are the abutting property owners and are entitled to relief according to the spirit of this law, the same as other owners.

It is our judgment therefore that this company should be required to pave and keep in repair five feet of the paving on this bridge.

In order that this be done according to law, you will have to give this company ten days' notice of your intention to pave so it may have an opportunity to do its own paving.

As this will raise new difficulties and as the whole question is somewhat embarrassing we would recommend the following reso-

lution upon condition that the Railway Company accept the same in writing.

(Sgd.) HUGH BRENNAN,
City Solicitor.
H. R. REYNOLDS.
J. P. SMITH.
I. E. TONE.
ROLLINS.
C. C. LANE.

and the following resolution.

Resolved that the action heretofore taken by the City Council with reference to the Des Moines Street Railway Company crossing Walnut Street Bridge to be and the same is hereby cancelled
1218 and set aside. The said company be and is hereby authorized to lay a double track on said bridge and that the Geo. E. King Bridge Co., is hereby requested to permit said track to be laid when the floor of the bridge is being put down.

The provisions herein granted are granted upon the following conditions, to-wit:—

First. That the Des Moines Street Railroad Company will pay into the City Treasury for the use of the Geo. E. King Bridge Co. 15 cents per yard as extra compensation for the work that said bridge company will be at in laying the pavement between the rails of the said Street Railroad Company's tracks.

Second. That the City of Des Moines in passing this resolution and the Geo. E. King Bridge Company and the Des Moines Street Railroad Company in acting under the same shall not waive any of their rights with reference to said bridge or the crossing of the same by the Street Railroad Company; Nor shall this action in any way interfere with the right of the City to collect of the said Railroad Company the costs of paving between the rails of said Company's tracks on said bridge, if any right it has; and the street railroad Company hereby waives its right to do its own paving on said bridge and waives time and the required notice of ten days as provided by Ordinance.

The Street Railroad Company in accepting these conditions waives none of its right to cross said bridge under the provisions of its contract, nor shall it be construed as an agreement on the part of said Company to pay for the paving between its rails.

This question is to be left open for future adjustment between said Company and the City.

By motion the foregoing report of Com. was adopted by Yeas Lane, Reynolds, Rollins, Sheldon, Sherman, Smith, Tone—7—Nays none and by motion the Resolution adopted by the same vote. Yeas 7, nays none.

The following was received:

DES MOINES, *Aug.* 3, 1891.

To the Honorable City Council Des Moines, Iowa:

1219 GENTLEMEN: The Des Moines Street Railroad Company hereby accepts the provisions of the resolution this day passed

authorizing the Des Moines Street Railroad Company or its assigns to lay a double track street railway across the new bridge now being built across the Des Moines River on Walnut Street in Des Moines, and agrees to pay into the City Treasury the extra compensation therein provided for and agree to abide by the conditions of such resolution.

Yours most respectfully,
(Signed) D. M. ST. RAILROAD CO.
By J. S. POLK, *Pt.*

* * * * * * *

1220 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1221 EXHIBIT No. 109. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book P, Pages 541 & 542, April 15, 1892.

To the Honorable City Council:

Your committee to whom was referred the resolution hereto attached have investigated the same and in view of the charter of the Des Moines Street Railroad Co. giving said road the right to haul over its lines of railway materials for the operation of said road. We recommend that the resolution asking that said road to construct a track on East 2nd st. connecting with their tracks on said streets at Locust st. and extending down 2d st. to and across Vine St. and at Locust St. and connecting with the steam railways crossing said St. be granted.

HUGH BRENNAN, *Sol.*
R. S. FINKBINE,
R. L. CHASE,
Bd. of Pub. Works.
H. R. REYNOLDS,
GEO. W. SHELDON,
Com. on R. R.

Resolution as follows: Resolved that the Des Moines Street Railroad Co. assigns be and it is hereby authorized to connect its tracks with the standard or steam Railways running into Des Moines, Ia. for the purpose of transferring coal, oil, and other materials and machinery used in the construction and operation of its railways from said steam railways to the place of use, and transferring such coal, oil and other materials, said street railroad may haul the cars of such steam or standard railways of its tracks provided the cars of such steam or standard railways shall not pass over the bridges of the City nor shall they be hauled through the streets with steam

engines or locomotives and by motion the report and resolution was adopted by Yeas—7—Nays None. Approved by the Mayor.

* * * * * * *

1222 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1223 EXHIBIT No 110. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book Q, Page 324, May 1, 1893.

Ald. Goodrell moved to reconsider the vote by which a resolution was adopted in relation to the kind of rail to be used by the Street Railroad Companies and the motion prevailed by Yeas—7—Nays 1. Wise voting no. And he offered the following as a substitute.

Resolved, That the Des Moines Street Railroad Company and the Des Moines Suburban Railway, be and they are hereby authorized in laying their tracks on Walnut Street from West Fourth Street to East Fifth Street and on west Sixth st. from Mulberry Street to Grand Avenue to use what is known as the "Shanghi T" rail and if the same when laid on said streets shall be satisfactory to the City Council it may authorize the use of such rail by said Companies on other streets in the City of Des Moines, and by his motion adopted by Yeas—8—Nays none.

Approved by the Mayor.

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1224 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1225 EXHIBIT No. 111. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book Q, Page 461, July 17, 1893.

Ald. Vertrees offered the following:

Resolved That the Des Moines St. Railroad Co. or its assigns be and it is hereby authorized to extend its track along Mulberry St. from W. 6th St. to W. 7th st. thence north along 7th st. to W. Walnut St. and operate its cars over such extension. Said track or tracks to be laid down and operated in accordance with the Ordinance of the City of Des Moines heretofore granted to it and its assignor the Des Moines St. Railway Co. By motion adopted by Yeas—9—Nays none. Approved.

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1226 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1227 EXHIBIT No. 112. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book Q, Page 491, July 24, 1893.

Ald. Vertrees offered the following:

Whereas on West Walnut Street the Des Moines Street Railway Co. in re-arranging its tracks between Fourth and Sixth Streets desires at present to remove the north track between said points and adjust the remaining track so as to avoid making two curves between said streets.

Now, Therefore, Be it resolved that said Company be and it is hereby authorized to re-arrange its south track on Walnut Street under the supervision of the City Engineer so that it shall run in a straight line from the point where it now crosses West Sixth Street from the center of Walnut Street to intersection with West Fourth Street, and by motion adopted by Yeas eight, Nays none, Approved.

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1228 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1229 EXHIBIT No. 113. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain, and operate its railways along and upon a certain street and to cross certain streets in the city of Des Moines.

O. 426. P. May 14, 1888.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there is hereby granted to the Des Moines Rapid Transit Company the right to build, construct and operate its railway along and upon the thirty-three foot street running east and west between West & Burton's and Cottage Hill additions to Fort Des Moines, now included in the corporate limits of the city of Des Moines, and said company shall have a right to *a*lay down and maintain a single or double track along and upon said street, with all switches and turn-outs necessary in operating its said road. And said company shall have the further right to cross the following streets of said city, to-wit: Nineteenth street, twenty-first street and Western Avenue.

SEC. 2. Whenever said street shall be paved or improved at the established grade thereon said Des Moines Rapid Transit Company will bring that part of such street covered by its tracks to such grade, and will pave and maintain in width three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets crossed by said railway within the corporate limits of the city.

SEC. 3. That if the said Rapid Transit Company shall procure a street thirty-three and one-third feet wide, to be opened upon each side of and abutting on said street, it shall have the right to appropriate a strip of said street so running east and west between said West & Burton's and Cottage Hill additions, ten feet wide on each side of the center line thereof for its exclusive right of-way,
1230 and it shall not in such case be compelled to pave the said twenty-foot right-of-way only at the street crossings. But said company shall curb its right-of-way when said street is ordered to be paved.

SEC. 4. The right-of-way herein granted is upon the express terms and conditions that the Said Des Moines Rapid Transit Company shall never use said street or any part thereof for general railroad purposes; nor shall said company grant or allow any other railway company to use its track or right-of-way for general railway purposes.

SEC. 5. That said company shall have the right to propel its cars on its railway by a steam or electric motor, but the speed thereof shall not exceed eight miles per hour within the corporate limits of said city. Provided, that in the construction of said railway an ordinary railroad engine may be used.

SEC. 6. If the said Rapid Transit Company shall at any time procure a street to be opened upon either or both sides of its right-of-way from the west line of West & Burton's Addition to Western Avenue and the city of Des Moines shall order the same paved then, and in that case, said company shall put in and maintain curbing on each side of its right-of-way on the line of said street or streets.

SEC. 7. This ordinance shall not be construed as granting said Des Moines Rapid Transit Company the right to lay down or maintain its tracks along, upon or across any other street or streets than the ones names herein.

SEC. 8. The fare to be charged by said Des Moines Rapid Transit Company shall not exceed five cents within the corporate limits of said city, for one trip or over one route.

SEC. 9. Said Des Moines Rapid Transit Company shall be
1231 liable for any and all damages resulting to persons or property resulting from the construction, maintaining and operating said railway.

SEC. 10. The said Des Moines Rapid Transit Company hereby agrees to complete said road and to have cars running thereon on or before the first day of June, A. D. 1889, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited.

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1232 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1233 EXHIBIT No. 114. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railways along Grand Avenue in the City of Des Moines, Iowa, from the point where its railway as now projected will intersect said avenue, between West Seventeenth and Nineteenth streets, to the intersection of East Fifth Street with said Grand Avenue.

O. 440. P. August 21, 1888, Amendment to O. 426.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there be and is hereby granted to the Des Moines Rapid Transit Company the right to build or acquire by lease or otherwise and maintain and operate a single or double track street railway, with all necessary switches and turn-outs, along and over Grand Avenue in the city of Des Moines, from the point on said avenue between West Seventeenth and Nineteenth streets where said company's road as now projected will intersect said street to the point of intersection of East Fifth street with said avenue, and it is hereby authorized to propel its cars thereon by steam applied by what is known as the cable system or by what are known as noiseless steam or electric motors, or other power except horse power, and the power herein granted to operate its said road with electricity or other power except steam or animal power, shall be exclusive for the period of ten years from the acceptance of this ordinance; provided, however, that this grant shall in no way abridge or interfere with vested rights of any other street railway company now occupying said street, if any there by.

SEC. 2. In the construction and operation of said company's railway along said street said company shall exercise all reasonable care so as not unnecessarily to interfere with or impede the public travel on said street. All new tracks laid by said company shall be laid so as to conform to the established grade of the city, if the surface of the street has been brought to grade, and if not, then the
1234 track may be laid so as to conform to the surface of the street and shall be brought by the company to grade when the city brings its streets or any part thereof to grade free from expense to the city.

SEC. 3. The tracks of said company shall be laid in the center of said street except where a double track is contemplated, or when some other company is or shall be hereafter authorized to lay a track on the same street, and in either of said last named cases the tracks shall be laid at such distance from the center of said street as that the center of said street shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the City Engineer, and provided further, that if any

other street railway company shall hereafter be granted the right to lay its tracks upon any part of said street upon which said Rapid Transit Railway Company, or its assigns, shall have a track or tracks of its railroad then laid or acquired, it shall, on demand of said other company, remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built. Provided, however, that before it shall be required to make such removal the company desiring the same shall pay or tender the cost of making such change and if upon such demand and tender of the cost of such removal the same shall not be made within thirty days when such track shall be removed and relaid by the City Marshal, under the supervision of the City Engineer, at the cost of the company desiring such change. Provided, however, that there shall not be more than two tracks of any railway laid on any part of said street except for the necessary switches and turnouts, nor shall said tracks be laid within twelve feet of the sidewalk on said street except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car houses or shops.

1235 SEC. 4. The cars to be used upon such tracks by said company shall be of the best style and class used in other first class cities and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used thereon for propelling the cars of said company shall be of the most approved make and pattern and shall be what are termed noiseless motors.

SEC. 5. This grant shall be subject to all the rights of the water and gas companies and street railway companies, under grants heretofore made to them by the city of Des Moines, and said city shall in no way be held liable to said company, or its assigns, for any outlay or damage caused by said Rapid Transit Railway Company by the construction or repairing of sewers, repairing or building of bridges, grading and repairing the streets on which such railroad track is laid; provided, the same is done in a careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 6. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the city limits on any one route; provided, that such passage shall be continuous; provided, children under six years shall go free if accompanied by their parents.

SEC. 7. The cars of said company shall be entitled to the track in all cases when a team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly

1236 after being notified by the manager or conductor, by ringing of the car bell or otherwise, and should the person or persons in charge of such team or vehicle willfully violate the provisions of this section they shall, upon conviction thereof before the Police Judge of this city, be fined not less than five or more than fifty dollars.

SEC. 8. In construction of its railway upon or over all bridges or viaducts, upon the street or streets along which the same may run, said company shall so construct the same that the top surface of the rails of said railway shall be on the level with the surface of the floor of the bridge, and on all paved streets the top surface of the rails shall be on the level with the surface of the paving and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run, said parties, or their assigns, shall at their own expense pave or otherwise improve the space between the rails of their tracks, that it shall substantially correspond with the improvement of the street outside of the rails and tracks. When the tracks are laid upon a street already paved, the said parties, or their assigns, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails, and said parties, or their assigns, shall plank the space between the track at each principal crossing whenever required by the City Council and to its satisfaction, and they shall restore all streets whether paved or not to as good condition as before the laying down of their tracks.

SEC. 9. A failure from any fault of said company to use any track or tracks so constructed and run cars thereon on any street or part of street for a period of thirty days shall be deemed the abandonment of such street or part of street by said company or
1237 its assigns, and the City Council may by resolution declare such street or part of street abandoned and require the said company or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove its track or tracks when notified to do so, the City Council may cause the same to be removed at the expense of said company or its assigns.

SEC. 10. In constructing, repairing and operating said street railway said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property and shall at all times respond to the city of Des Moines for, and save it harmless from, all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers or employés in the construction, re-construction, repairing or operating of said street railway, or in paving, re-paving or repairing of any street or by reason of any — every act *act* done under the provisions of this ordinance.

SEC. 11. The said company, or its assigns, shall commence work on their line within five months from the acceptance of the terms and conditions of this ordinance, and shall have its track completed and cars running thereon within eighteen months from the date of said acceptance.

SEC. 12. The city of Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches, turn-outs and turn-tables of said road to be constructed under this ordinance, on said part of said streets, for the distance of two blocks or less, on such terms and for such compensation as may be agreed upon by the companies

interested; and, in case of disagreement, then the same to be settled by arbitrators one chosen by each of said companies, and the two chosen to select a third, and the persons thus chosen shall
1238 decide upon the terms and what would be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

SEC. 13. The slot rails used by said company in the construction and maintenance of said road, if it shall be constructed as a cable railroad, shall be constructed and placed so that the slot between said rails for the accom-odation of the grip arm shall not exceed in width three-fourths of an inch, and shall be so constructed as to present a flat and even surface and the upper surface of said slot rails adjoining said slot shall not be made beveling, but shall be made flat and square so as to prevent the wheels of carriages and other vehicles and the caulks of shoes on horses or other animals from dropping into and catching on said slot while passing along or over the same.

SEC. 14. The cars or carriages operated by said company, or its assigns, shall be run along and upon said railway in conformity with the following rules and regulations:

First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portion of the city nor more than ten miles an hour elsewhere.

Second. While the cars are turning corners from one street to another they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing on any street at any time, unless the same is waiting for passengers or for other proper purposes.

1239 & 1240 Fifth. No car shall be allowed to stop upon or over a cross-walk at intersecting streets, except to prevent a collision or to avoid danger to persons in the street or to take on or leave off passengers.

Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such crossings and they shall observe the same rule when nearing a track of any railway other than a street railway.

Seventh. Cars after sunset shall be provided with signal lights.

Eighth. Cars shall start from both ends of said line as early as six o'clock A. M. and run continuously as late as twelve o'clock midnight, from six to nine o'clock A. M. and from nine o'clock P. M. to midnight cars shall run at intervals of not more than ten minutes, and from nine o'clock A. M. until nine o'clock P. M. cars shall run at intervals of not more than five minutes.

SEC. 15. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that any judgment that may hereafter be obtained against said company, or assigns, for any injury to any person or property on account of the

construction or operation of said railway, shall be a lien upon all the property of said company and such lien shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

SEC. 16. The City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 17. Within sixty days from the passage of this ordinance said company shall file with the City Clerk a written acceptance of the grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company.

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1241 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1242 EXHIBIT No. 115. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain, and operate its railway along and upon a certain street and across certain streets in the incorporated town of Greenwood Park.

Be it ordained by the City Council of the Incorporated Town of Greenwood Park:

SECTION 1. That there is hereby granted to the Des Moines Rapid Transit Company the right to construct and operate its railway along and upon a sixty-five foot street running east and west through Greenwood Park, in the Incorporated Town of Greenwood Park, about six hundred feet north of Greenwood Avenue; and said company shall have the right to lay down and maintain a single or double track along and upon said street, with all switches and turnouts necessary in operating its said road, and shall have the further right to cross the following streets in said Greenwood Park: Clover Lane, Greenwood Lane, Maiden Lane and Park Lane.

SEC. 2. The right of way herein granted is upon the express terms and conditions that the said Des Moines Rapid Transit Company, its successors or assigns, shall never use said street or any part thereof, for general railway purposes, or allow any other railway company to use its track or right of way for general railway purposes.

SEC. 3. That if said Rapid Transit Company shall procure said street running east and west, as aforesaid, to be increased in width so that its entire width shall be 100 feet, it shall have the right to appropriate a strip thereof ten feet wide on each side of the center line thereof for its exclusive right of way, and shall not in such case be compelled to pave said 20-foot right of way except at street crossings, but shall curb the same whenever said street shall be ordered

paved, with such material as shall be ordered by said town council, and maintain said curbing.

1243 SEC. 4. That said company shall have the right to propel its cars on its railway by steam, cable, electric or motor, or any other approved power, but the speed thereof shall not exceed twelve nor be less than six miles an hour, within the corporate limits of said town; provided, that in the construction of said railway ordinary railroad engines may be used.

SEC. 5. That whenever said street or any street now or hereafter established in said incorporated town, on or over, which said railway shall run, shall be paved or improved at the established grade thereon, said Des Moines Rapid Transit Company will bring that part of said street covered by its tracks to such grade, and will pave and maintain in width 3½ feet each way, commencing at the center of the space between the rails, and provide and maintain suitable crossings upon all streets crossed by said railway within said incorporated town of Greenwood Park, and whenever said cross streets shall be more than 600 feet apart said Town Council may, in their discretion, require crossings intermediate which shall not be required to be nearer than 300 feet.

SEC. 6. This ordinance shall in no way be constructed as assenting to the plat of Greenwood Park, or as accepting the streets and alleys laid down thereon, or as assuming any responsibility whatever by the town of Greenwood Park, by reason of the platting of the aforesaid streets and alleys, nor as accepting the said streets and alleys, nor as accepting the said streets upon which said road shall be built in any part of the said incorporated town of Greenwood Park.

SEC. 7. Said Des Moines Rapid Transit Company shall be liable according to law for any and all damages to persons or property resulting from the construction, maintaining and operating said railway.

1244 SEC. 8. It is expressly provided that in granting the privileges hereby conferred, the incorporated town of Greenwood Park reserves the right of general police control over said railway, its construction and operation, and to require said road to — built of first class material and in a first class manner; it reserves the right to modify the rate of speed at which the cars shall be run within the limits laid down in section 4, and the right to require said company to construct and maintain safe and suitable crossings at all points where streets now or hereafter shall cross or intersect said railway, provided that said company shall stop at all crossings for passengers and at such other points as shall be designated by said town council; provided, however, said stopping places shall not be nearer than 300 feet to each other. And it is expressly understood that the rate of fare to or from any point of the incorporated Town of Greenwood Park, to or from any point in the city of Des Moines on the line of said road, shall not exceed the sum of five cents per passenger.

SEC. 9. It is further expressly provided that if said company shall fail to build and operate at least one mile of road within said in-

corporated town by the first day of May, 1889, this ordinance shall be void and the rights and privileges hereby granted shall revert to the incorporated town, and the like result shall ensue if the said company shall fail to comply substantially with all the provisions and conditions herein set forth.

SEC. 10. This ordinance shall take effect and be in force from and after its passage and publication as provided by law, and its acceptance by said company in writing, to be filed with the town recorder within thirty days from the date of its passage, and without expense to the town of Greenwood Park.

Approved September 28, 1888.

A. N. DENMAN, *Mayor.*

1245 The within ordinance is hereby accepted by the Des Moines Rapid Transit Company.

October 25, 1888.

By order of the Directors.

C. H. GATCH,
Pres't. D. M. R. T. Co.

STATE OF IOWA, *Polk County:*

I, C. B. Kauffman, recorder of the incorporated town of Greenwood Park, Polk County, Iowa, do hereby certify that the within is a true and correct copy of the original ordinance known as "An ordinance granting to the Des Moines Rapid Transit Company the right to construct maintain and operate its railway along and upon certain streets and across certain streets in the incorporated town of Greenwood Park," passed by the council of said town September 28, 1888, and accepted by said D. M. R. T. Co., October 25, 1888.

C. B. KAUFFMAN,
Recorder of the Incorporated Town of Greenwood Park.

I do hereby certify that five (5) copies of the within ordinance were posted by me in different places in the town of Greenwood Park.

C. B. KAUFFMAN, *Recorder.*

GREENWOOD PARK, *Sept.* 15, 1888.

At a special meeting of the town council of the incorporated town of Greenwood Park, held at the residence of the mayor, A. N. Denman, the following proceedings were had, viz:

1246 & 1247 Roll call showed the following members of the council present: Mayor A. N. Denman, Councilmen, E. R. Mason, Frank Pelton, Wash Miller, C. H. Getchell; absent W. M. McCain and J. H. Windsor.

A draft of an ordinance entitled, An ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along and upon a certain street and across certain streets in the incorporated town of Greenwood Park.

The ordinance was read and referred to a committee, consisting of the Mayor, and the Councilmen Mason, Getchell, and Windsor. Adjournment to meet at call of the Mayor.

C. B. KAUFFMAN, *Recorder.*

GREENWOOD PARK, *September* 28, 1888.

Council met in adjourned session at the residence of E. R. Mason, Esq., The members present were Mayor Denman and councilmen, Mason, Miller, Getchell and Windsor. The object being the consideration of an ordinance granting the Des Moines Rapid Transit Company the right to maintain and operate its railway over and across certain streets in the incorporated town of Greenwood Park. The committee reported an ordinance as follows: (Then follows ordinance as amended) Ordinance, on motion of Windsor, was read a second time. Mr. Windsor moved a suspension of the rules, and that the ordinance be read a third time by its title, and put upon its final passage.

Motion carried, and ordinance passed by the following vote: Yeas, Mr. Mayor and Councilmen Mason, Getchell, Windsor and Miller. On Motion, recorder was instructed to furnish copy of said ordinance to the officers of said company for acceptance. Adjourned.

C. B. KAUFFMAN, *Recorder.*

I hereby certify the above and foregoing to be a correct copy of the records as above referred to, as shown by the records in this office.

[SEAL.] R. B. DENNIS.
City Clerk, Des Moines, Iowa.

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1248 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1249 EXHIBIT No. 116. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book P, Page 528, March 21, 1892.

Ald. Tone offered the following:

Resolved that the City Clerk be and he is directed to record in the Ordinance Book of the town of Greenwood Park an ordinance entitled "An Ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along and upon certain street- and across certain streets in the incorporated town of Greenwood Park." The same appearing from the affidavit of A. N. Denman, the Mayor — said town to have been

duly passed and not recorded by neglect of the City Clerk and by motion adopted by Yeas 9 Nays None. Approved by the Mayor.

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1250 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1251 EXHIBIT No. 117. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance amending an ordinance entitled "An Ordinance granting to the Des Moines Rapid Transit Company the right to extend its railway along Grand Avenue, in the City of Des Moines, Iowa, from the point where its railway as now projected will intersect said avenue, between Seventeenth and Nineteenth Streets, to the intersection of East Fifth street with said Grand Avenue," passed August 21, 1888, approved on same date and published August 23, 1888.

O. 464. P. March 12, 1889.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That section one of the above entitled ordinance, passed August 21, 1888, be and the same is hereby repealed, and there is enacted in lieu thereof the following:

SEC. 1. That there be and is hereby granted to the Des Moines Rapid Transit Company the right to build or acquire by lease or otherwise, and maintain and operate a single or double track street railway, with all necessary switches and turn-outs, along and over Grand Avenue, in the City of Des Moines, from a point on said avenue between West Seventeenth Street and Nineteenth Street, where said company's road as now constructed intersects the said street, to a point of intersection of East Fifth street with said avenue and along and over the following other streets and parts of streets, to-wit: West Fifteenth street from Grand Avenue to Walnut street, thence east on Walnut street to West Eighth street, thence south, on West Eighth street to Mulberry street, thence east on Mulberry street to West Fifth street, thence south on West Fifth street to Court avenue, thence east on Court avenue to *to* East Sixth street, thence north on East Sixth street to Walnut street, thence east — Walnut street to the corporation line; East Sixteenth street from Capitol avenue south to Brooks street, thence east on Brooks street to the corporation line; East Fourteenth street from Walnut street
1252 to the north corporation line; East Seventh street from Des Moines river to Locust street, thence crossing Locust street to Pennsylvania avenue, thence on Pennsylvania avenue to Lyon street, thence east on Lyon street to East Eighteenth street, thence north on East Eighteenth street to the corporation line; East Nineteenth street from Walnut Street to Scott street, thence east on Scott

street to the corporation line; West Twenty-fourth street, from the line of said company's railway to the north corporation line; West Seventh street from north corporation line to the south corporation line. And the said company is hereby authorized to propel its cars thereon by steam applied by what is known as the cable system, or by the Patton motor system, or by electricity, or by such other power as may hereafter be approved by ordinance of the City Council.

Provided, however, that if electricity is used it shall be applied by a storage battery or through underground conduits, and the power herein granted to operate its said road with electricity or other power shall be exclusive only as to Grand Avenue for the period of ten years from the acceptance of this ordinance.

Provided, however, that this grant shall in no way abridge or interfere with the vested rights of any other street railway company now occupying any of said streets or parts of streets, if any there be, and this company is authorized to run its cars along and over the track or tracks of any other street railway in the city of Des Moines, and to haul cars of any such company on and over its tracks;

Provided, such other company shall consent thereto, and said Rapid Transit Company shall not be required to run its cars over its line oftener than once every thirty minutes; provided it shall run the same on schedule time.

SEC. 2. That section two of the ordinance of which this is amendatory is hereby repealed, and there is enacted in lieu thereof the following section:

1253 SEC. 2. That this company or its assigns shall commence work on its road within six months from the passage of this ordinance and construct or procure by lease or otherwise two miles of its track within one year from such date, and shall construct or procure one mile of track each year thereafter, until it shall have occupied the several streets along which the right of way is herein granted to it, and a failure so to do shall forfeit the rights herein granted, over and along the streets or parts of streets not thus occupied.

* * * * * * *

1254 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1255 EXHIBIT No. 118. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book X, Page 463, March 18th, 1889.

The following accepted was received, read, and on motion of Ald. Baker was ordered spread on the City Record, viz.

To the Honorable Mayor and City Council of the City of Des Moines:

The ordinance passed by the City Council of the City of Des Moines, Iowa, March 12th, 1889, and approved by the Mayor of said City on the 13th day of March 1889, entitled "An Ordinance amending an ordinance entitled "An Ordinance granting to the Des Moines Rapid Transit Company the right to extend its Railway along Grand Avenue in the City of Des Moines, Iowa, from the point where its Railway as now projected will intersect said Avenue between 17th and 19th streets, to the intersection of East 5th street with said Grand Avenue, passed August 21st, 1888, and approved on the same date and published Aug. 23d, 1888, is hereby accepted by said Des Moines Rapid Transit Company upon the terms and conditions thereof.

By order of the Board.

(Sgd.) DES MOINES RAPID TRANSIT COMPANY.

Attest March 14th, 1889.
By C. H. GATCH, *Prest.* and
J. S. POLK, *Secy.*

* * * * * * *

1256 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1257 EXHIBIT No. 119. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents: That the Des Moines Rapid Transit Company, of Polk County and state of Iowa, in consideration of the sum of Five Hundred Dollars, to it in hand paid by the Des Moines Suburban Railway Company, does hereby sell and convey unto the said Suburban Railway Company, its franchises and right of way, which it now has, or may hereafter acquire under ordinances or resolutions of the City Council of the City of Des Moines, Iowa, so far as they authorize it to construct, maintain and operate a street railway on the following streets in the City of Des Moines, to-wit:

Court Avenue from West Fifth Street to East Sixth street, East Sixth street from Court avenue to Walnut street, and east Walnut street from east Sixth Street to the east line of the incorporation of the City of Des Moines.

The intention being to convey to said Suburban Railway Company, all its rights and privileges, that the Des Moines Rapid Transit Company has to construct, maintain and operate street railways on the streets above mentioned, and said Suburban Railway Company is hereby authorized and empowered to enter upon and construct railways on said streets, under said charter, and resolutions, as fully as the Des Moines Rapid Transit Company could have done, had it not executed this conveyance.

In witness whereof, it has hereunto subscribed its corporate name by its President and Secretary, and affixed the seal of the corporation thereto, in pursuance of the order and direction of the Board of Directors of said company.

January 7th, 1890.

DES MOINES RAPID TRANSIT CO.,
By C. H. GATCH, *Pres't.*
[SEAL.] J. S. POLK, *Secretary.*

* * * * * * *

1258 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1259 EXHIBIT No. 120. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 286, March 11th, 1890.

Whereas the Des Moines Rapid Transit Company commenced work on its lines within the time required by ordinance No. 440 passed August 21st, 1886, and amendments heretofore passed by the City Council—and—

Whereas it has constructed its line on Ingersoll Avenue, and a portion of its line on Walnut street, and is desirous of constructing its other lines at an early day on the several streets mentioned in said ordinance,

Now, Therefore, be it Resolved, That the time fixed in said ordinance and the ordinance amending the same for the construction or acquisition by lease or otherwise of the first two miles of its said road be and it is extended two years from March the 15th, 1890, and said Company shall not be required to build or acquire under said ordinance more than one mile of its said road each year thereafter. And it is authorized to operate said roads in the manner authorized by said ordinance, or by Electricity applied by what is known as the Overhead System or by such other manner as may be hereafter adopted and approved for first class roads in other cities, and the right so granted to said company under said ordinances

and this resolution shall be exclusive for ten years from this date on all streets granted to said company—And the City of Des Moines during such time will grant no company or person the right to build a street railway on streets parallel to the several streets mentioned in said ordinances and amendments thereto nearer than two blocks—Provided this Resolution shall in no way impair the rights heretofore granted to other street Railways.

This resolution shall be, and become a part of the contract between said Railway Company, and the City, When accepted by the Company, provided it is so accepted within thirty days from the

1260 passage thereof—

(Sgd.) MACY.

Resolution adopted on roll call as follows, Yeas, Bolton Brady, Hammer, Macy, Reynolds, Smith & Weitz—7—Nays None.

Approved by W. L. Carpenter, Mayor.

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1261 (Endorsed:) Filed Sep. 15, 1905. E. R. Mason, Clerk.

1262 EXHIBIT No. 121. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

Resolution of the Des Moines City Council Extending the Time to Des Moines Rapid Transit Company to Build or Acquire its Roads and Giving it Certain and Exclusive Rights.

Whereas the Des Moines Rapid Transit Company commenced work on its lines within the time required by Ordinance No. 440, passed August 21st, 1888, and the amendments thereto heretofore passed by the City Council, and

Whereas, it has constructed its line on Ingersoll Avenue and a portion of its line — Walnut Street and is desirous of constructing its other lines at an early day, on the several streets mentioned in said ordinance, now, therefore, be it

Resolved: That the time fixed in said ordinance and the ordinance amending the same, for the construction or acquisition by lease or otherwise, of the first two miles of its roads, be, and the same is extended two years from March 15th, 1890, and said company shall not be required to build or acquire under said ordinance more than one mile of its road each year thereafter. And it is authorized to operate its said roads in the manner authorized by said ordinance, or by electricity, applied by what is known as the overhead system, or by such other manner as may be hereafter adopted and approved for first class roads in other cities. And the right so granted to said company under said ordinance and this resolution shall be exclusive for ten years from this date, on all streets granted to said company.

And the city of Des Moines, during such time will grant no company or person the right to build a street railway on streets parallel to the several streets mentioned in said ordinance, and amendments thereto, nearer than two blocks, provided this resolution shall in no way impair the rights heretofore granted to other street railways.

1263 This resolution shall be and become a part of the contract between said railway company and the city, when accepted by the company, provided it is so accepted within thirty days from the passage thereof.

Approved.

WM. L. CARPENTER, *Mayor.*
I. A. HAMMER, *City Clerk.*

Passed March 12, 1890.

To the Hon. Mayor and City Council of the City of Des Moines, Iowa.

GENTLEMEN: You are hereby notified that the Des Moines Rapid Transit Company has accepted, and does hereby accept the provisions passed by your honorable body on the 11th day of March, 1890, granting to this company, among other rights, an extension of time for building and acquiring its road on the several streets mentioned in the several ordinances heretofore passed by your honorable body, authorizing said company to build street railways in the city of Des Moines.

Des Moines, March 11th, 1890.

DES MOINES RAPID TRANSIT COMPANY,
By C. H. GATCH, *President.*
J. S. POLK, *Secretary.*

* * * * * * *

1264 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1265 EXHIBIT No. 122. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book O, Page 288, March 13th, 1890.

Acceptance of the Rapid Transit Company as follows—By—

To the Honorable Mayor and City Council of the City of Des Moines, Iowa.

GENTLEMEN: You are hereby notified that the Des Moines Rapid Transit Company has accepted, and does hereby accept the provisions of a resolution passed by your Honorable Body on the 11th day of March, 1890, granting to this Company among other rights

an extension of time for building and acquiring its road on the several streets mentioned in the several ordinances heretofore passed by your Honorable Body, authorizing said Company to build street railways in the City of Des Moines.

Dated March 11th, 1890

(Sgd.) DES MOINES RAPID TRANSIT CO.,
By C. H. GATCH, *President.*

Attest:
J. S. POLK, *Secretary.*

* * * * * * *

1266 ((Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1267 EXHIBIT No. 123. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

This indenture, made the 31st day of May, A. D. 1890, by and between C. C. Loomis, Sheriff of Polk County, Iowa, of the first part, and D. B. Murrow of the County of Polk and state of Iowa of the second part, witnesseth.

That whereas, by virtue of a general execution directed to C. C. Loomis, sheriff of Polk County, Iowa, dated the 16th day of April A. D., 1890, and issued out of the Clerk's office of the District Court of the State of Iowa, in and for Polk County, under the seal of said Court, in an action in favor of Johnathan Bradway, and against the Des Moines Rapid Transit Company, for the sum of $600.00 and the further sum of $206.45 costs, the said C. C. Loomis sheriff, as aforesaid did, on the 28th day of April, A. D., 1890, levy upon the personal property hereinafter described as the property of the said Des Moines Rapid Transit Company, defendant, to satisfy the said execution amounting to $806.45 together with interest and accruing costs:

And, whereas, the said Sheriff gave four weeks' notice of the time and place of selling said property by posting up printed notices thereof, at three public places in Polk Co., one of which was at the Court House in Des Moines, where the last District Court was held, and by causing two publications of said notice to be made in the Saturday Review, a newspaper printed at Des Moines, in said County, before the day of sale May 31st, 1890. And whereas said sheriff, C. C. Loomis, in pursuance of such notice in conformity to law, and by virtue of said execution, did, on the 31st day of May, 1890, at the east front door of the Court House in Des Moines, offer said property for sale, and then and there sell the same at public auction to D. B. Murrow, he being the highest and best bidder therefor. Now therefore in consideration of the premises, and the said sum of $683.70 so bid and paid as aforesaid, the receipt whereof is hereby

acknowledged, I, said Sheriff, party of the first part do hereby
1268 sell and convey unto the said D. B. Murrow, party of the second part, his heirs and assigns, forever, the following described personal property, to-wit:—

The franchise of the Des Moines Rapid Transit Railway Company (except so far as it covers Court Avenue, East Sixth and Walnut streets) its right of way and road bed on what is known as Ingersoll Avenue, commencing at Grand Avenue and running west into the S. E. ¼ of Sec. 1, Tp. 78, R. 25 together with the railway built thereon, also all cars machinery and tools used in operating said Des Moines Rapid Transit Railway.

To have and to hold the same as fully and absolutely as the said party of the first part, by virtue of the premises could sell and convey the same.

In witness whereof, the said party of the first part has hereunto set his hand this 31st day of May, A. D. 1890.

C. C. LOOMIS,
Sheriff of Polk County, Iowa.

* * * * * * *

1269 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1270 EXHIBIT No. 124. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.,
vs.
CITY OF DES MOINES.

Know all men by these presents, that the Des Moines Rapid Transit Company, pursuant to a resolution passed by its Board of Directors on the 28th day of October, 1890, and for a valuable consideration does here by bargain, sell, transfer and convey unto the Des Moines Suburban Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Iowa, all and singular the rights, franchises, right of way, easements, road bed, rolling stock and equipment stations, platforms, coal, houses, water tanks, car houses, and all appurtenances of every kind and nature and embracing all property of every kind and nature heretofore and now owned by the grantor herein, including electrical equipment, poles, wire and all property rights and franchises whatsoever heretofore and now belonging to the grantor including the franchises heretofore received by the grantor from the incorporated Town of Greenwood Park, and from the City of Des Moines, and from any other source whatsoever.

To have and to hold unto the said Des Moines Suburban Railway Company in its own right and absolutely forever.

Signed this 29th day of October, 1890.

[SEAL.] DES MOINES RAPID TRANSIT COMPANY.
By C. H. GATCH, *President.*

Attest:
JNO. S. POLK, *Sec'y.*

* * * * * * *

1271 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1272 EXHIBIT No. 125. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents: That I, D. B. Murrow, of Polk County and state of Iowa, in consideration of Eight hundred Sixty-three and 70/100 dollars in hand paid by Des Moines Suburban Railway Company, of Polk County and state of Iowa, do hereby sell and convey unto said Des Moines Suburban Railway Company, the following described personal property, now in possession of D. B. Murrow in the county of Polk and state of Iowa, to-wit:

The franchise of the Des Moines Rapid Transit Railway Company (except so far as it covers Court Avenue east Sixth and Walnut streets) its right of way and road bed, on what is known as Ingersoll Avenue, commencing at Grand Avenue and running west into the southeast quarter (1/4) of Section one (1) Township Seventy-eight (78) range Twenty-five (25) together with the railway built thereon; also all cars machinery and tools used in operating said Des Moines Rapid Transit Railway, being the same property conveyed to me May 31st, 1890 by C. C. Loomis, Sheriff.

Signed the 8th day of December, A. D., 1890.

D. B. MURROW.

In presence of

_____.

* * * * * * *

1273 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1274 EXHIBIT No. 126. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway along and upon a certain street and to cross certain streets in the City of Des Moines.

O. 425. P. May 16, 1888.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there is hereby granted to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway with a single track along and upon the east fifteen feet of First Street, in said city, from Center Street to a point two hundred feet north of north line of Crocker Street, and across such other streets in said city as may be necessary in the construction of its said road.

SEC. 2. The right-of-way granted in section one is upon the express condition that said Des Moines Belt Line Railway shall grade said street occupied by them at least twenty-five feet west of the west rail of their track to such grade as may be prescribed by the City Council.

SEC. 3. Whenever said street shall be paved or improved at the established grade thereon, said Des Moines Belt Line Railway Company shall bring that part of such street covered by its tracks to such grades, and shall pave and maintain three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets, whether paved or not paved, crossed by said railway within the corporate limits of said city. And shall build all necessary culverts for drainage of water wherever necessary.

SEC. 4. The right-of-way granted is upon the express terms and conditions that the said Des Moines Belt Line Railway Company shall never use said street, or any part thereof, for general railroad purposes; nor shall said company grant or allow any other railway company to use its track for general railway purposes along
1275 or upon the street named. It is herein provided by the express provisions of this ordinance that the gauge of said Des Moines Belt Line Railway Company shall be four feet, eight and one-half inches, and that the center of the rails of said railway shall not be west of the center of the right-of-way on said street herein granted.

SEC. 5. That said company shall have the right to propel its cars on its railway by steam or electric motor, but the speed thereof shall not exceed eight miles per hour upon any streets herein named within the corporate limits of said city; provided, that in constructing said road said company may use an ordinary railway locomotive.

SEC. 6. This ordinance shall not be construed as granting said Des Moines Belt Line Railway Company the right to lay down or maintain its track lengthwise upon any other street than the one named herein.

SEC. 7. Said Des Moines Belt Line Railway Company shall be liable for any and all damages resulting to persons or property on account of the construction, maintaining and operating said railway and to hold the city of Des Moines forever harmless from any and all damages that may result from granting the rights and privileges herein conferred. And said railway company shall be subject in the operation of its railway upon said street to such reasonable regulations as the Council may from time to time prescribe.

SEC. 8. Said Des Moines Belt Line Railway Company shall, while constructing and maintaining its railway, put up and erect at its own cost and expense retaining walls on the west line of said street, at such points and places along such line as may be designated by the City Engineer and City Council, for the purpose of protecting property abutting on said street, the walls to be built and constructed with such material and in such manner as may be designated and directed by the City Engineer and City Council of Board of Public Works (in event of a Board of Public Works being established and

in existence at the time said work is done), the work to be
1276 done under their supervision and direction. The walls so erected to be kept at all times in good repair by said railway company. In no event shall said walls be built, save and except upon the west line of said street.

SEC. 9. In the event of the Des Moines Belt Line Railway Company, its successors or assigns, shall as now or hereafter constituted or named and within five years from the passage of this ordinance or at any time thereafter, cease to exist or operate said railway then and in that event, and upon a failure to operate said road for a period of sixty days, all rights and privileges herein granted shall from the date of its non-existence, or a failure to so operate, constitute a revocation of all the rights and privileges granted by this ordinance without further notice upon the part of the city; save and except that the revocation herein named shall not be absolute until this ordinance has been repealed by the City Council.

SEC. 10. The fare to be charged by said Des Moines Belt Line Railway Company shall not exceed five cents within the corporate limits of said city.

SEC. 11. The said Des Moines Belt Line Railway Company hereby agrees to complete said road and to have cars running thereon on or before one year from the date of the passage of this ordinance, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited.

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1277 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1278 EXHIBIT No. 127. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

A petition signed by Chas. L. Gilchrist and others was presented asking council to grant right-of-way to Belt Line Railway on Main street between North street and State street. Mr. Goode explained that names attached to petition represented all the property owners abutting on said street between points named. Moved by Mr. Fink that prayer of petitioners be granted and recorder be instructed to draft resolution in accordance with petition. Carried.

The following resolution was then presented:

"Resolved, By the town council of the town of North Des Moines, Iowa, that the petition of Chas. L. Gilchrist and others be granted; that the east thirty feet of Main street in "Central Place," between North street and Forest avenue, and west thirty feet of said Main street, between Forest avenue and State street, be vacated as a public highway, said vacation to extend only to the portions of said street above described, and the same is hereby vacated and relinquished."

Resolution adopted. Ayes: Councilmen, Conrad, Copperstone, Fink, Howell and Mayor—5—Nays Hill—1.

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1279 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1280 EXHIBIT No. 128. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 168, July 7th, 1888.

Ald. Weitz offered the following:

Be it resolved by the City Council of the City of Des Moines, Iowa: That the Des Moines Belt Line Railway Co. be granted the right to lay their tracks 1 foot & 9 inches below the recommended grade by the City Engineer along the Right of Way granted to said Belt Line Railway Co. on Bluff St., and that they be ordered to put up a good & sufficient safe-guard on their right of way on said street with a six foot gate at the entrance of Mr. Fitzgerald's Boat House and to plank a good foot-walk between the rails at said entrance—Same to be done under the supervision of the City Engineer—

On motion adopted. Approved.

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1281 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1282 EXHIBIT No. 129. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 169, July 7th, 1888.

Ald. Macy offered the following:

Resolved that the Des Moines Belt Line Railway is hereby granted the right to act upon the prayer of certain petitioners residing and owning property on Bluff St. this day granted by the Council—Provided the Des Moines Belt Line Railway shall enter into a contract with the City of Des Moines to hold said City harmless from any damage resulting to the property owners residing and owning property on said Bluff St. by reason of their action in the manner stated in said petition—

On motion adopted. Approved.

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1283 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1284 EXHIBIT No. 130. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 441.

An ordinance amending ordinance number 425 granting certain privileges to the Des Moines Belt Line Railway Company.

Be it Ordained by the City Council of the City of Des Moines, Iowa.

That ordinance Number 425 be and the same is hereby amended so as to authorize said Des Moines Belt Line Railway Company to extend its road and run its cars and motors over and upon the following streets inside the City of Des Moines, to-wit:

On Commerical Street from the east end thereof to Second Street. South on Second Street to Locust and west on Locust Street to east line of Sixth Avenue.

2d. Said Des Moines Belt Line Railway Company is hereby authorized and empowered to use the tracks of the Des Moines Electric Railway Company, the successors of the Des Moines Street Railway Company "Broad Gauge," from Second Street west on Locust Street to Fourth Street, a distance of two blocks as provided for and reserved in the ordinance granting the said Broad Gauge Company its charter. Said Belt Line Railway Company is to pay to said Electric Railway Company an amount to be determined as provided in the ordinance granting to said Electric Railway Company or its grantor the right to occupy the streets of the City. Said grant of the two blocks is made upon the express condition that their cars shall be operated so as not to interfere unnecessarily with the schedule time of said Electric Railway Company.

3d. Consent authority and permission *is* hereby given to said Belt Line Railway Company to equip and operate said line with noiseless steam motors.

4th. This amendment is granted subject to all restrictions heretofore made in the original ordinance heretofore granted to the Des Moines Belt Line Railway Company and subject also to such reasonable rules and regulations as the City Council may from time
1285 to time impose upon said Company.

5th. This amendment is granted upon condition that said Belt Line Railway Company hold the City of Des Moines harmless from damages by reason of the granting of these rights, and by reason of the operating of said line by noiseless steam motors or by reason of the conflict with any other street railway company occupying said track.

SECTION 6. This grant shall be subject to all the rights of the water and gas companies and street railway companies under grants heretofore made to them by the City of Des Moines, and said City

shall in no way be held liable to said company or its assigns for any outlay or damage to said Belt Line Railway Company by the construction or repairing of sewers, repairing or rebuilding of bridges, grading and repairing the streets on which such railroad track is laid, provided the same is done in a careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SECTION 7. The motors and cars of said Company upon the streets herein named shall not exceed six miles per hour, and in turning corners of said streets shall not exceed four miles per hour.

SECTION 8. In the construction of its railway upon or over bridges or viaducts upon the street or streets along which the same may run, said Company shall so construct the same that the top surface of the floor of the bridge, and on all paved streets the top surface of the rails shall be on the level with the surface of the paving and in case the City at any time shall pave or otherwise improve the surface of any street along which said railway may run, said parties or their assigns shall at their own expense pave or otherwise improve the surface of any street along which said railway may run, said parties or their assigns shall at their own expense pave or otherwise improve the space between the rails of their tracks that it shall substantially correspond with the improvement of the street outside of the rails of their track. When the tracks are laid
1286 upon a street already the said parties or their assigns shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails and said parties or their assigns shall plank the space between the track at each principal crossing whenever required by the City Council and to its satisfaction, and they shall restore all streets, whether paved or not, to as good condition as before laying down of their track.

SECTION 9. The City of Des Moines especially reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches, turn-outs, and turn-tables of said road to be constructed under this ordinance, on said part of said streets, for the distance of two blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested; and in case of disagreement, then the same to be settled by arbitrators, one chosen by each of said companies, and two chosen to select a third and the persons thus chosen shall decide upon the terms and what will be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

SECTION 10. The cars or carriages operated by said Company or its assigns shall be run along and upon said railway in conformity with the following rules and regulations:

Rule 1st. Cars traveling in the same direction shall not approach each other nearer than a distance of 200 feet except in cases of unavoidable accident or when cars are near stations or where they should be coupled together.

Rule 2d. No car shall be left standing on any street at any time

unless the same is waiting for passengers or for other proper purposes.

Rule 3d. No cars shall be allowed to stop upon or over a crosswalk at intersecting streets, except to prevent a collision or to avoid danger to persons in the street or to take on or leave off passengers.

1287 **Rule 4th.** Conductors shall announce to passengers in distinct tone the names of street crossings, as the cars approach such crossings, and they shall observe the same rule when nearing a track of any railway other than a street railway.

Rule 5th. Cars after sunset shall be provided with signal lights.

SECTION 11. The cars of said Company shall be entitled to the track and in all cases when a team or vehicle shall meet or be overtaken by the cars of said company upon the railway track of said company such team or vehicle shall give way for such car promptly after being notified by the Engineer or conductor by the ringing of the bell or otherwise, and should the person or persons in charge of such teams or vehicles wilfully violate the provisions of this section, they shall, upon conviction, before a Police Magistrate of said City, be fined not less than five or more than twenty-five dollars.

SECTION 12. This ordinance shall take effect and be in force from and after its passage and publication as provided by law, and without expense to the City.

Approved August 22d, 1888.

Attest:

I. A. HAMMER, *City Clerk.*

Passed August 22d, 1888.
Published August 24, 1888.

I, I. A. Hammer, City Clerk of the City of Des Moines do hereby certify that the foregoing ordinance was passed at a meeting of the City Council held August 22d, 1888, and approved by the Mayor August 22, 1888, and was published in the Iowa State Leader August 24, 1888.

I. A. HAMMER, *City Clerk.*
By WM. MATTHEWS, *Ass't.*

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1288 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1289 EXHIBIT No. 131. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Feb. 20, 1889.

Ordinance from the Belt Line Company in regard to getting the right-of-way of State Street and west read for the first time and referred to the street and alley committee.

The Des Moines Belt Line ordinance was read for the second time. This ordinance calls for the right-of-way on State street from the main street to the corporate limits, and thence south on Twenty-third street to University avenue, and thence east on University avenue to Eleventh street, and thence north to State Street.

Feb. 28, 1889.

The street and alley committee, to whom was referred the ordinance of the Belt Line Railway Company, reported for the adoption of the same. A motion was made that the ordinance be read by sections, this being its third reading. Carried and first section read. Motion by Conrad that the reading of a protest which was presented by citizens residing on Twenty-third street and University avenue carried. Remonstrance was then read and the names attached to it. Motion by Conrad to strike out from section one all that part after the words, "west to the corporate limits of the town." The vote was taken. Conrad, Copperstone, Howell, Twining, and mayor voted aye—5—Hill and Schramm voted nay—2. Ayes 5; noes 2. Carried. The remainder of the ordinance was read by sections. Amendments and substitutes were offered and adopted, and also several new sections. A protest from property owners along State street was read and placed on file.

* * * * * * *

1290 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1291 EXHIBIT No. 132. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance to grant certain rights and privileges in the occupation of certain streets of the incorporated town of North Des Moines to the Des Moines Belt Line Railway Company.

Be it ordained by the Town Council of the Incorporated Town of North Des Moines:

SECTION 1. That there is hereby granted to the Des Moines Belt

Line Railway Company, its successors and assigns, the right and privilege of constructing and operating with a single track, turnouts, switches, and turn tables, a line of street railway over, upon and along the following named streets in said incorporated town of North Des Moines to-wit: On State street from Main Street west to the corporate limits of said town. Such rights and privileges shall continue for the period of twenty-five years from and after the passage of this ordinance.

SECTION 2. The said Des Moines Belt Line Railway Company shall have the right to construct its said tracks with what is known as "T" rails, but shall so lay and maintain the same that they shall present the least practicable obstruction to public travel upon said streets.

SECTION 3. It is expressly provided, and this grant is upon the condition, that the said Des Moines Belt Line Railway Company shall complete this line of street railway and have the cars running on said street from city of Des Moines to Eleventh within six months from and after the passage of this ordinance, and shall complete the remainder of this said line, and have cars running on the streets above named, within eighteen months from and after the passage of this ordinance, and if, at the expiration of said periods, the said Des Moines Belt Line Railway Company shall not have laid its rails and completed its line according to the above provisions, the council may forfeit so much of said grant and the right and privilege
1292 of said company to such of said streets as are not, when said resolution of forfeiture is adopted, occupied by said company in the manner aforesaid.

SECTION 4. The said Des Moines Belt Line Railway Company may use such motive power for the purpose of propelling its cars as is now in use by the Des Moines Belt Line Railway Company, or by such other motive-power that said company may hereafter adopt for such purpose.

SECTION 5. The said company shall run a car each way over its line from Locust street in the city of Des Moines to its western terminus on State street in the town of North Des Moines every thirty minutes between the hours of six o'clock A. M. and twelve o'clock midnight every day in the year, breakages or other unavoidable accidents only excepted, and each car shall run through from the points mentioned above without transferring passengers. Such road shall be for passenger travel only, and shall be at all times subject to reasonable rules and regulations prescribed by the North Des Moines council.

SECTION 6. The said company shall put all streets used by them on a practical grade, plank streets and alleys at its own cost under the supervision of street and alley committee.

SECTION 7. That within eighteen months from the passage and acceptance of this ordinance said company shall have its cars running from the city of Des Moines to Twenty-third street in the town of North Des Moines, Iowa.

SECTION 8. Said company are granted this ordinance upon the express condition that they shall use for generating steam either

hard coal, coke or coal oil or other fuel that will create as little smoke as either of the above and no soft coal to be used.

SECTION 9. In no case shall the fee for one passenger over the entire route one way exceed the sum of five (5) cents.

1293 SECTION 10. That said charter is granted on the streets as specified, which are accepted and occupied by the town as streets, and that the part and parts of said streets not owned by the town are to be occupied as fast as they can be procured without expense to the town.

SECTION 11. Be it further ordained that all damages to the town or to any owners of abutting property caused by the passage of this ordinance are to be settled by said company.

SECTION 12. The drivers of said company shall in all cases call the name of each street at each cross street on each trip.

SECTION 13. Be it further ordained that in all cases where streets are condemned or purchased by said company the said streets shall be deeded to the town of North Des Moines subject to the right-of-way of said company.

SECTION 14. This ordinance shall be accepted by said company in writing by the president and secretary thereof within thirty days from its passage.

This ordinance passed February 28, 1889.

J. B. LOUGHRAN, *Mayor.*
SIMON SWIHART, *Recorder.*

I hereby certify that the above is a true and correct copy of the records as they appear.

W. B. TOMPKINS,
Recorder North Des Moines.

* * * * * * *

1294 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1295 EXHIBIT No. 133. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting certain rights and privileges in the occupation of streets and alleys in the town of North Des Moines, Iowa, to the Des Moines Belt Line Railway Company.

SECTION 1. Be it ordained by the town council of North Des Moines that there be and is hereby granted to the Des Moines Belt Line Railway Company the right to build, maintain and operate a single or double track street railway, with all necessary switches and turn-outs, along and over the following streets and alleys in the town of North Des Moines, to-wit:

On all streets and alleys within the corporate limits of said town, and lying north of the Des Moines River, south from Des Moines

river on Sixth Avenue to Prospect Boulevard, on Prospect Boulevard west to Seventh Street, south on Seventh street from Prospect Boulevard to College Avenue and south on Fifth street from College avenue to south corporation line; south from Des Moines River on Arlington Avenue to south corporation line, on College avenue from the east to the west corporation lines, south from College avenue on Sixteenth to south corporation line, and the said railway company is hereby authorized to propel its cars on the streets and alleys heretofore named, by electric or any other power except steam or animal, for the term of twenty-five years, and the power herein granted to operate its said road, with electric or any other power except steam or animal power shall be exclusive for the term of five years from the acceptance of this ordinance. And the exclusive privileges or rights herein specified are granted only upon the condition that said Des Moines Belt Line Railway Company shall at all times after the completion of their tracks or lines as herein named, operate the same in a manner to give good and sufficient service to the public and a failure to operate said road in the manner herein described shall work a forfeiture of such exclusive privilege.

1296 SEC. 2. In the construction and operation of said company's railway over said streets and alleys said company shall exercise all reasonable care so as to not unnecessarily interfere with or impede the public travel on said streets and alleys. All new tracks laid by said company shall be laid so as to conform to the established grade of the town, and if the surface of the street has been brought to grade and if not then the track may be laid so as to conform to the surface of the street and shall be brought by the company to grade when the town brings its streets or alleys or any part thereof to grade, free from expense to the town.

SEC. 3. The tracks of said company shall be laid in the center of said streets or alleys except when a double track is contemplated or when some other company shall be hereafter authorized to lay a track shall be laid at such distance from the center of said streets as that the center of said streets shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the town engineer at the expense of said company or companies, and provided further that if any other street railway company shall hereafter be granted the right to lay its tracks upon any part of said streets or alleys upon which said Des Moines Belt Line Railway Company or its assigns shall have a track or tracks of its railway then laid or acquired it shall on demand of said other company remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built. Provided, however, that before it shall be required to make such removal, the company desiring the same shall pay or tender the cost of making such change, and if upon such demand and tender

1297 of the cost of such removal the same shall not be made within thirty days, then such tracks shall be removed and relaid by the city marshal under the supervision of the town engineer at the cost of the company desiring such change. Provided, however, that there shall not be more than two tracks of any rail-

way laid on any part of said street or alleys except for the necessary switches and turn-outs, nor shall said tracks be laid within twelve feet of the sidewalk except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car-houses and shops, except when authorized by ordinance or resolution of the town council.

SEC. 4. The cars to be used upon the tracks of said company shall be of the best style and class used in other cities, and all motors used thereon for *the* propelling the cars of said company shall be of the most approved make and pattern.

SEC. 5. This grant shall be subject to all the rights of water and gas companies under grants heretofore made to them by the town of North Des Moines, and said town shall in no way be held liable to said company or its assigns for any outlay or damage caused to said Des Moines Belt Line Railway Company by the construction or repairing of sewers, repairing or building of bridges, grading and repairing of streets and alleys on which railway track is laid, providing the same is done in a careful and expeditious manner, or damage resulting in the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 6. The rates of fare charged by the said company shall not exceed five cents for each person carried in the same direction between any two points within the city limits of the city of Des Moines and town of North Des Moines on any route; provided that such passage shall be continuous, provided children under six
1298 years shall go free if accompanied by their parents.

SEC. 7. The cars of said company shall be entitled to the track in all cases where a team or vehicle shall meet or be overtaken by the cars of said company upon the railway track of said company. Such team or vehicle shall give way for such car promptly after being notified by the manager or conductor by the ringing of the car bell or otherwise, and should the person or persons in charge of such team or vehicle wilfully violate the provisions of this section, they shall upon conviction thereof before the mayor of this town, be fined not less than five or more than fifty dollars.

SEC. 8. In the construction of its railways upon or over all bridges, upon the street or streets along which the same may run, the company shall so construct the same that the top surface of the rails of said company shall be on the level of the surface of the floor of the bridge, and on all paved streets tram rails only shall be used the top surface of which shall be on a level with the surface of the paving, and in case the town at any time shall pave, or otherwise improve the surface of any street upon which said company may run, said company or its assigns, shall at its own expense, pave or otherwise improve the surface of the space of three and one-half feet, each way from the center of the space between the rails of their tracks that it shall substantially correspond with the improvements of the street outside of the rails and tracks, when the tracks, to be laid upon a street already paved, the said parties, or their assigns, shall deposit with the *the* treasurer on estimate of the town engineer, before paving is removed, a sufficient amount of money to cover said estimate, for the paving of the space of three and one-half feet each way from

the center of the space within the rails, and said parties or
1299 their assigns shall plank the surface between the tracks at each crossing whenever required by the town council, and to its satisfaction, and they shall restore all streets whether paved or not, to as good condition as before the laying their tracks.

SEC. 9. A failure from any fault of said company to use any track or tracks so constructed, and run cars thereon according to the rules herein named, and such other reasonable rules and regulations as may be hereafter adopted by the town council on any street or part of streets, shall be deemed the abandonment of said street or part of streets by said company or its assigns, unless temporarily prevented by unavoidable accidents, or some cause over which said company have no control, and the town council may by resolution declare such street or part of streets abandoned, and require said company or its assigns to remove their track or tracks from such street or part of streets, and upon failure or refusal of said company to remove its track or tracks from such street or part of streets, and upon failure or refusal of said company to remove its track or tracks when notified so to do, the town council may cause the same to be removed at the expense of said company or its assigns. *to remove their track or tracks from such street or part of streets, and upon failure or refusal of said company to remove its track or tracks when notified so to do, the town council may cause the same to be removed at the expense of said company or its assigns.*

SEC. 10. In constructing, repairing or operating said street railway, said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property, and shall at all times respond to the town of North Des Moines for, and save it harmless from, all and every damage, injury, cost or expense, caused or occasioned by reason of any act of said company, officers or employés in the construction, reconstruction, or repairing or operating said street railway, or in paving, repaving or repairing of any street or by reason of any and every act done under the provisions of this ordinance.

SEC. 11. Said Company or its assigns, shall commence
1300 work on their lines within six months from the acceptance of the terms and conditions of this ordinance, and shall have its tracks completed, and cars running thereon, within eighteen months from the date of said acceptance, and if the work is not begun, and tracks completed, and cars running thereon within the time herein specified, then the council may elect to annul this ordinance, and forfeit all rights of said Belt Line Railway Company thereunder.

SEC. 12. The town of North Des Moines expressly reserves the right to allow and permit any street railway companies to run its cars over, and along the tracks, switches, turn-outs and turn-tables of said road to be constructed under this ordinance on said part of said streets for the distance of two blocks, or less on such terms, and for such compensation as may be agreed upon by the companies interested, and in case of disagreement, then the same to be settled by arbitrators, one chosen by such of said companies, and

the two chosen to select a third, and the persons thus chosen shall decide upon the terms and what would be reasonable compensation as to the use of such road, and such terms and conditions are expressly consented to by the said company.

SEC. 13. That said ordinance is granted on the streets and alleys as specified, which are accepted and occupied by the town as streets and alleys and that part and parts of said streets and alleys not owned by the town may be occupied as fast as they can be procured without expense to the town.

SEC. 14. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that they shall not occupy the present roadway on the bridge over the Des Moines River at Sixth avenue, that it shall not lay any track between the present curb lines of Sixth avenue from the north
1301 & 1302 end of bridge to north corporation line; that any judgement that may hereafter be obtained against said company or assigns for any injury to any person or property, on account of the construction or operation of said railway, shall be a lien upon the property of said company, and such liens shall be prior and superior to the liens of any mortgage or trust deed executed by said company.

SEC. 15. The town council reserves the right to adopt, from time to time, and compel compliance therewith, reasonable rules and regulations for the operation of its cars by said company.

SEC. 16. The said Des Moines Belt Line Railway Company is hereby authorized and permitted to use steam motor in the construction of its tracks over said streets and alleys, and to open track in time of heavy snowstorms.

SEC. 17. Within thirty days of the passage of this ordinance said company shall file with the town clerk a written acceptance of the grants herein named, of the conditions, regulations and limitations thereof, signed by duly authorized officers of said company.

SEC. 18. The said Des Moines Belt Line Railway Company is authorized to lay a single track, and operate its cars thereon, on Sixth avenue in the west part thereof north of the Des Moines river.

SEC. 19. Be it further ordained that this ordinance shall take effect and be in force from and after its passage and acceptance by said company, as herein specified, publication of this ordinance to be without expense to the town.

Adopted February 7, 1890.

JOHN MacVICAR, *Mayor.*

I hereby certify that the above is a true and correct copy of the original ordinance, as passed by the North Des Moines Council on February 7, 1890.

W. B. THOMPKINS,
Recorder, North Des Moines.

* * * * * * *

1303 (Endorsed:) Filed Sept. 15, 1896. E. R. Mason, Clerk.

1304 EXHIBIT No. 134. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents, That the Des Moines Belt Line Railway Company, a corporation duly organized and existing under and by virtue of the laws of the state of Iowa, pursuant to a resolution passed by its Board of Directors on the 28th day of October, 1899, and for a valuable consideration, does hereby bargain, sell, transfer and convey unto the Des Moines Suburban Railway Company, a corporation organized and existing under the laws of the State of Iowa, and to its successor or successors, the entire corporate property of the said The Des Moines Belt Line Railway Company, of Des Moines, Iowa, and all of its franchises and privileges, extending from a point on the east line of Second Street, on the south thirty three (33) feet of lot one (1) Block eleven (11) Hall's Addition, thence east and northerly to the corner of Douglas and Hamilton Streets, in Highland Park Addition (now included within the corporate limits of Des Moines) Polk County, Iowa, a distance of about four miles including all the rights and franchises of the said Railway Company, including also along the entire line all the right of way acquired by purchase, gift or condemnation, road bed finished or in progress of construction, with all the material for construction, depot grounds, gravel pits, quarries, real estate, station houses, water tanks, machine shops, turn tables, coal houses and sheds, and all things of any other name and nature belonging to said party of the first part, pertaining to said railroad, and also all machinery, locomotives, rolling stock, all tools and supplies, extensions, and all other property heretofore acquired or which may hereafter be acquired by the said Des Moines Belt Line Railway Company, now owned or hereafter acquired by the said railway company, and also the following real estate, the property of the said railway company, party of the first part, to-wit:—

1305 Beginning at the north west corner of lot five (5) of the official plat of the east half of the north east quarter of section four (4) and the west half of the north west quarter of section three (3) township seventy eight (78) Range twenty four (24) west of the 5th P. M. thence east thirteen (13) feet, thence south eight (8) degrees and twenty (20) minutes west, eighty eight (88) feet to the west line of said lot five (5), thence north eighty eight (88) feet to the place of beginning. And also beginning at the center of Center Street at the south west corner of said lot five (5), thence east forty one and eight tenths (41-8-10) feet, thence north two (2) degrees and twenty minutes (20) east, twenty nine and five tenths (29-5-10) feet, thence north nine (9) degrees and thirty-seven (37) minutes east thirty and four tenths (30-4-10) feet to the north line (diagonal) of said lot five (5), thence south sixty two (62) degrees west along said north line, fifty-five (55)

feet to the west line of said lot. Thence south thirty three (33) feet to the place of beginning.

Beginning in the Center of Center Street, at the Northwest corner of lot twelve (12) of the official plat of the northeast quarter of the southeast quarter of section four (4), Township seventy-eight (78) north, Range twenty-four (24) west; thence east forty one and eight tenths (41-8-10) feet; thence south one degree and fifty minutes east thirty and four tenths (30-4-10) feet thence south eight (8) degrees and fifty minutes (50) east, sixty and five tenths (60-5-10) feet; thence south six (6) degrees and thirty (30) minutes east one hundred and five and five tenths (105 5-10) feet; thence south two (2) degrees and fifteen (15) minutes east seventy five (75) feet, thence south seven (7) degrees and thirty four
1306 (34) minutes west, twenty six and two tenths (26 2-10) feet; thence south thirty four (34) degrees and fifteen (15) minutes west, twenty nine and five tenths (29 5-10) feet to the west line of said lot twelve (12) at a point sixteen and eight tenths (16 8-10) feet north of the south west corner of said lot; thence north along the west line of said lot twelve (12) to the place of beginning.

South thirty three (33) feet lot one (1) Block Eleven (11) Hall's Addition to Ft. Des Moines, now City of Des Moines, Iowa, except that part heretofore conveyed to E. T. Likes.

Also commencing four hundred and ninety five (495) feet east of a point thirty three (33) feet south of the south west corner of lot No. seven (7) Block ten (10) Hall's Addition to Ft. Des Moines, thence running south one hundred and thirty two (132) feet; thence east to the Des Moines River; thence northerly up the bank of the Des Moines River to a point due east of the place of beginning; thence due west to the place of beginning, except a strip of ground five (5) feet in width, which is in dispute with adjoining owners, which strip is hereby quit claimed, but title is not warranted.

Also the east ten (10) feet lots two (2) and three (3), Block seven (7) Hall's Addition to Ft. Des Moines, Iowa.

Also commencing at the north east corner of lot two (2), Block seven (7), Hall's Addition to Ft. Des Moines, Iowa, thence east on same line with lot two (2) sixty five (65) feet to north east corner lot three (3) official plat of east half of north east quarter of section four (4) Township seventy eight (78) range twenty four (24) thence south one hundred and forty 9-10 (141) feet thence west sixty five feet (65) to Block seven (7) thence north to the place of beginning.

Also lot twenty one (21) Polk & Hubbell's official plat of lot two (2) official plat of east half of the north east quarter of
1307 section four (4), township seventy eight (78) range twenty four (24) (except a strip sixteen (16) feet wide off north end and now used for an alley) also so much of lots one (1) two (2) three (3), four (4), seven (7) eight (8) nine (9), ten (10), and eleven (11) of Polk & Hubbell's official plat of lot two (2) of the official plat of the east half of north east quarter of section four (4)

township seventy-eight (78) range twenty four (24) as lies east of the alley.

Also beginning at the south east corner of lot four (4), of the official plat of the east half of north east quarter of section four (4), township seventy-eight (78) range twenty four (24) thence north along the east line of said lot to the northeast corner thereof, thence east to the Des Moines River, thence southerly along said river to a point due east of beginning, thence west to place of beginning.

Also so much of lots eleven (11), ten (10), nine (9), north half of eight (8), seven (7), three (3), and two (2) of Polk & Hubbell's official plat of lot two (2) of the official plat of the east half of the north east quarter of section four (4), Township seventy-eight (78) range twenty four (24) as lies west of the alley running through said lots.

Also a strip of ground thirty (30) feet wide running through lot one (1) of said last named official plat, and on a line with a strip of ground thirty (30) feet wide off the west side of lot nine (9), Block Fourteen (14) Hall's Addition to Ft. Des Moines, Iowa.

Also a strip of ground thirty (30) feet wide off the west side of lot nine (9), Block fourteen (14) Hall's Addition to Ft. Des Moines, Iowa.

Also lot six (6) Block thirteen (13) Hall's Addition to Ft. Des Moines, Iowa.

1308 Also lots seventeen (17) eighteen (18) nineteen (19) and twenty (20) in Fickel's SubDivision of lots nine (9), ten (10), eleven (11), twelve (12) and part of lot eight (8), in Block twelve (12) Hall's Addition to Ft. Des Moines, Iowa.

Also commencing at a point fifty (50) feet west of the south east corner of lot seventy nine (79) in Twining's Addition; thence north west to a point one hundred and fifty (150) feet due west of the north east corner of lot eighty (80), in Twinning's addition; thence west seventy and seven tenths (70 7-10) feet, thence south east to a point one hundred and thirty four and three tenths (134 3-10) feet east of the south west corner of lot seventy-nine (79); thence due east to place of beginning, all in Twinning's Addition situated in section twenty six (26), township seventy nine (79) range twenty four (24), west 5th P. M. Polk County, Iowa.

Also beginning at a point forty five (45) feet west of the northeast corner of lot No. two hundred and twenty six (226) L. M. Mann's second addition to Lake Park, thence east forty five feet (45) to the north east corner of said lot, thence south on the east line of said lot to the southeast corner thereof, thence west eleven feet (11), thence running in a northwesterly direction in a straight line to the place of beginning, all a part of lot two hundred and twenty six (226) of L. M. Mann's second Addition to Lake Park, being a subdivision of official plat of lots one (1), three (3), and four (4) of lots four (4) and seven (7) of the Thompson Estate, in section twenty seven (27) Township seventy nine (79) range twenty four (24) west of the 5th P. M., Iowa.

Also a strip of ground fifty (50) feet wide, being twenty five (25) feet from the center of the railroad track of the Des Moines Belt Line Railway Company, as now laid down, over, upon and across lots one (1) two (2) and three (3) Block Eighteen (18) of Oak Park Addition, all in Polk County, Iowa.

1309 Also lots seventy eight (78) in Twinning's Addition, being a part of section twenty six (26) township seventy nine (79) range twenty four (24) Polk County, Iowa.

Also a strip of ground fifty feet (50) wide, being twenty five (25) feet on each side of the center of the railroad track of the Des Moines Belt Line Railway Company, as now laid down, and in operation over, upon and across lots two hundred and twenty seven (227), two hundred and twenty eight (228) two hundred and twenty nine (229), two hundred and thirty (230) and two hundred and thirty one (231) L. M. Mann's Second Addition to Lake Park, being a sub-division of official plat of lots one (1), three (3), and four (4) of lots four (4) and seven (7), of the Thompson Estate, in section twenty seven (27) township seventy nine (79), range twenty four (24) west of the 5th P. M., Iowa.

Also a strip of ground fifty (50) feet wide, being twenty five (25) feet on each side of the center of the railway track of the Des Moines Belt Line Railway Company, as now laid down and in operation over, upon and across the following real estate, to-wit: Across the unplatted portion of official plat of lots three (3) of lots four (4), and seven (7) of the Thompson Estate, in section twenty seven (27) township seventy nine (79), range twenty four (24) west of 5th P. M., Iowa.

The said grantee herein, and its successors to have and to hold the above described premises in its own right and absolutely forever.

Signed this 29th day of October, 1899.

DES MOINES BELT LINE RAILWAY CO.,
By G. M. HIPPEE, *President.*

Attest:

GEO. B. HIPPEE, *Secty.*
[SEAL.]

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1310 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1311 EXHIBIT No. 135. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to the Des Moines River Line Street Railway Company the right to Construct, and Operate a Street Railway in Certain Streets in the City of Des Moines.

O. 115. P. September 20, 1888.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there be and is hereby granted to the Des Moines River Line Street Railway Company, its successors and assigns, the right to construct, maintain and operate a street railway, with single or double tracks and necessary turnouts and switches, if a single track only is laid, along, over and upon the following streets in said city, to-wit: Upon Commerical Street from the east end thereof to west Second Street; upon Second street from the north line of Commerical street to Locust Street; upon west Locust street from Second street to the east line of West Fourth street. And the said Des Moines River Line Street Railway Company is hereby authorized and empowered to use the tracks of the Des Moines Electric Railway Company, now laid between Second and Fourth streets on Locust street, upon making compensation therefor as provided in the ordinance granting said Electric Railway Company, or its grantor, the right to occupy the streets of said city. And the said Des Moines River Line Street Railway Company shall so run its cars upon the tracks of the said Electric Railway Company as not to unreasonably interfere with the use thereof by said last named company, and in no event shall any additional track be laid down upon Locust street between Second and Fourth streets by the Des Moines River Line Street Railway Company. And there shall not be laid on Second street between Commercial and Locust streets more than two tracks, and any company having the right to do so and desiring to occupy said portion of Second street after said two tracks are laid shall use such tracks upon making compensation as herein provided. And there shall not be laid on Second street, between Commerical and Locust street, more than the two tracks now allowed to the Des Moines Electric Railway Company, Provided, however, that
1312 the said two tracks may be laid by the said Des Moines River Line Street Railway Company, Provided further, that this section shall not take effect until the written consent of the Des Moines Electric Railway Company thereto is filed with the City Clerk.

SEC. 2. The said Des Moines River Line Street Railway Company is hereby empowered and authorized to propel its cars by steam applied by the cable system, or what is known as noiseless steam motors. Provided, however, that this grant shall not be construed to infringe upon the vested rights of any other street railway company.

SEC. 3. The tracks of said street railway company shall be used for no other purpose than to render a street railway service, and shall not connect with any other railway; and no railway car or carriage used upon any other railway in this state shall be used upon any of said tracks.

Provided, further, that this section shall not deprive other street railway cars from running over and along and upon said railway tracks; provided, that nothing in this section shall be so construed so as to prevent this company from running the motors and passenger cars of the Des Moines Belt Line Railway Company over their line as long as the said Des Moines Belt Line Railway Company is not carrying on a regular commercial railway business.

SEC. 4. If a noiseless steam motor be used for propelling the cars of said street railway company, or the cars used upon its said tracks, the fuel used by such motors shall be either anthracite coal, coke or such other fuel as will produce no smoke in its consumption.

SEC. 5. In the construction and operation of said company's railway along said streets, said company shall exercise all reasonable care so as not unnecessarily to interfere with or impede the public travel on said streets. All new tracks laid by said company shall be laid so as to conform to the established grade of the city, if the surface of the street has been brought to grade, and if not, then the track may be laid so as to conform to the surface of the street, and shall be brought by the company to grade when the city brings its streets, or any part thereof, to grade free from expense to the city.

1313 SEC. 6. The tracks of said company shall be laid in the center of said street except when a double track is contemplated or when some other company is or shall hereafter be authorized to lay a track on the same street, and in either of said last named cases the track shall be laid at such distance from the center of said street as that the center of said street shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the City Engineer as directed by the City Council. "And the company owning or operating such other track shall, upon the application of said Des Moines River Line Street Railway Company, at its expense, remove its track to such point as may be designated by the City Engineer, and approved by the City Council, so that the two tracks may be an equal distance from the center of the street. And if within five days after such application is made such track is not so removed, then the Mayor shall order it to be so removed and laid by the City Marshal at the expense of the Des Moines River Line Street Railway Company. Provided, further, that if any other street railway company shall hereafter be granted the right to lay its track upon any part of said street upon which said Des Moines River Line Street Railway Company or its assigns, shall have a track, or tracks, of its railroad hereafter laid or acquired, it shall on demand of said other company remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built; provided, however, that before it shall be required to make said re-

noval the company desiring the same shall pay or tender the cost of making such change. And if upon such demand and tender of the cost of such removal the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshal under the supervision of the City Engineer, at the cost of the company desiring such change. Provided, however, that there shall not be more than two tracks of any railroad laid on any part of said street except for the necessary switches and turn-outs nor shall said tracks be laid within twelve feet of the sidewalk on said street except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car houses or shops.

SEC. 7. The cars to be used upon such tracks by said company shall be of the best style and class used in other first-class cities, and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used thereon for propelling the cars of said company shall be of the most approved make and pattern, and shall be what are termed noiseless motors. And the gauge of said tracks shall be four feet, eight and one-half inches, and shall be laid with a five inch tram rail upon all streets.

SEC. 8. This grant shall be subject to all the rights of the water and gas companies and street railway companies, under grants heretofore made to them by the city of Des Moines, and said city shall in no way be held liable to said company or its assigns for any outlay or damage caused to said Des Moines River Line Street Railway Company by the construction or repairing of sewers, repairing or rebuilding of bridges, grading and repairing the streets on which such railroad track is laid; provided, the same is done in a reasonably careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 9. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the city limits on any one route; provided, that such passage shall be continuous; provided, children under six years shall go free if accompanied by their parents.

SEC. 10. The cars of said company shall be entitled to the track; and in all cases where any team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the bell or otherwise; and should the person or persons in charge of such team or vehicle willfully violate the provisions of this section, they shall, upon conviction thereof before the Police Judge of said city, be fined not less than five nor more than twenty-five dollars.

SEC. 11. In the construction of its railway upon or over all bridges or viaducts upon the street or streets along which the same may run, said company shall so construct the same that the top surface of the rails of said railway shall be on a level with the surface of the floor of the bridge, and on all paved streets the top surface

of the rail shall be on a level with the surface of the paving, and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run said parties, or their assigns shall at their own expense pave or otherwise improve the street or streets along *which* said street railroad company lay their track or tracks as provided by law; namely, to pave and maintain the pavement three and one-half feet each way from the center of their tracks, and that it shall substantially correspond with the improvement of the street outside of the rails and track. When the tracks are laid upon a street already paved the said parties, or their assigns, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails and said parties, or their assigns, shall plank the space between the track at each principal crossing, whenever required by the City Council, and to its satisfaction, and they shall restore all streets, whether paved or not, to as good condition as before the laying down of their tracks.

SEC. 12. A failure from any fault of said company to use any track or tracks so constructed, and run cars thereon, on any street or part of street, for a period of thirty days, shall be deemed the abandonment of such street or part of street by said company, or its assigns, and the City Council may by resolution declare such street or part of street abandoned and require the said com-
1316 pany, or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove such track or tracks, when notified to do so, the City Council may cause the same to be removed at the expense of said company or its assigns.

SEC. 13. In constructing, repairing and operating said street railway said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property, and shall at all times respond to the city of Des Moines for, and save it harmless from all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers, or employees, in the construction, reconstruction, repairing or operating of said street railway, or in paving, repairing, or repairing of said street or by reason of any and every act done under the provisions of this ordinance.

SEC. 14. The said company, or its assigns shall commence work on their line within two months from the acceptance of the terms and conditions of this ordinance, and shall have its tracks completed and cars running thereon within twelve months from the date of said acceptance.

SEC. 15. The City of Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches and turnouts of said road to be constructed under this ordinance, on said parts of said streets, for the distance of three blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested, and in case of disagreement, then the same to be settled by arbitration—one chosen by each of said companies, and the two chosen to select a

third, and the persons thus chosen shall decide upon the terms and what would be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

1317 SEC. 16. The slot rails used by said company in the construction and maintenance of said road, if it shall be constructed as a cable railroad, shall be constructed and placed so that the slot between said rails for the accommodation of the grip arm shall not exceed in width three-fourths of an inch, and shall be so constructed as to present a flat and even surface, and the upper surface of said slot rails, adjoining said slot shall not be made beveling, but shall be made flat and square so as to prevent the wheels of carriages and other vehicles from dropping into and catching on said slot while passing along or over the same.

SEC. 17. The cars or carriages operated by said company or its assigns, shall be run along and upon said railway in conformity with the following rules and regulations, to-wit:

First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portion of the city nor more than ten miles an hour elsewhere.

Second. While cars are turning corners from one street to another they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing upon any street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop upon or over a cross-walk, at intersecting streets, except to prevent a collision or to avoid danger to persons in the street, or to take on or leave off passengers.

Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any railway other than a street railway company.

1318 Seventh. Cars after sunset shall be provided with signal lights.

SEC. 18. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that any judgment that may hereafter be obtained against said company, or assigns, for any injury to any person or property on account of the construction or operation of said railway, shall be a lien upon all the property of said company, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

SEC. 19. The City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 20. Within six days from the passage of this ordinance said company shall file with the City Clerk a written acceptance of the

grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company.

SEC. 21. After the expiration of ten years from the passage of this ordinance the said company shall pay annually to the city of Des Moines five per cent. of its net earnings as consideration for the rights and privileges herein granted, but nothing herein shall be construed as exempting said Des Moines River Line Street Railway Company from taxation the same as other property subject to taxation.

SEC. 22. The City Council reserves the right after six months from and after the steam motors have first commenced running upon the streets covered by this ordinance, should the same become unreasonably dangerous to public safety, to order the discontinuance of said motors upon the streets named in this ordinance.

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1319 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1320 EXHIBIT No. 136. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book N, Page 269, Oct. 1st, 1888.

The Des Moines River Line Street Railway Company presented the following acceptance the same having been filed with the City Clerk September 29th, 1888—viz—

To the Mayor and Council of the City of Des Moines, Iowa:

The undersigned the Des Moines River Line Street Railway Company hereby accepts an ordinance this day passed granting to it certain privileges and rights upon Commercial, Second and Locust Streets in said City, with its conditions and provisions—September 29th, 1888.

(Sgd.) DES MOINES RIVER LINE STREET RY. CO.,
By L. M. GOODE, *President.*

Attest:

L. M. MANN, *Secretary.*

The foregoing was read—accepted and ordered placed on record.

* * * * * * *

1321 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1322 EXHIBIT No. 137. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book "N," Page 270, Oct. 1st, 1888.

Des Moines River Line Street Railway Co. presented the following petition:—

To the Hon. Mayor and City Council of the City of Des Moines:

The undersigned Des Moines River Line Street Railway Co. respectfully petition your honorable body to permit them to lay a "T" rail on 2d St. from Commercial Street to Locust Street and if our petition is granted we agree to plank our track with three inch oak lumber. One board to be laid outside of the rails and the entire space between said rails to be planked with oak. We agree to maintain this planking, and as soon as paving is laid to take it up and pave, laying the flat rail as provided by our ordinance.

Respectfully submitted.

DES MOINES RIVE- LINE
ST. RY. CO.,
By L. W. GOODE, *President.*

On motion the foregoing petition was granted.

Ald. Morris offered the following: Resolved: By the City Council of the City of Des Moines: That consent, and authority and permission *is* hereby given the Des Moines River Line Street Railway Co. to lay "T" rails on Second Street from Commercial to Locust Streets, provided, however, That said Company shall at once put down oak plank three inches in thickness, one plank to be outside each of said rails, and the entire space between the rails, to be planked with 3 inch oak lumber. Provided also that said company shall maintain said planking in good condition, and whenever said street is paved they shall lay the flat rail and put down their share of pavement as provided in their ordinance, taking up said planking and "T" rails, said rails & planking to be on a level with said street at all points, and all to be done at the expense of said Company.

1323 On Motion the resolution was adopted.
Approved by the Mayor.

* * * * * * *

1324 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1325 EXHIBIT No. 138. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents, That the Des Moines River Line Street Railway Company, pursuant to a resolution of its Board of Directors, passed on the 28th day of October, 1890, and for a valuable consideration, does hereby bargain, sell, transfer and convey unto the Des Moines Suburban Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Iowa, all its right-of-way and street railroad extending from the east line of Fourth street where it intersects Locust Street, east on Locust to Second Street, north on Second to Commerical Street thence east on Commerical street to the east line thereof where it intersects the line of railway of the Des Moines Belt Line Railway Company, together with all its real estate, turn tables, tracks, side tracks, buildings, structures, water tanks, cars, machinery, tools, and equipment, easements, and franchises, including all franchises it may have heretofore obtained from the city of Des Moines or from any other source whatever, and including all property of every kind and nature whatsoever heretofore and now belonging to the grantor herein.

To have and to hold unto the said The Des Moines Suburban Railway Company in its own right and absolutely forever.

(Sgd.) DES MOINES RIVER LINE STREET RAILWAY COMPANY,
[SEAL.] By G. M. HIPPEE, *President.*
Oct. 29th, 1890.

Attest:
GEO. B. HIPPEE, *Sec'y.*

* * * * * * * *

1326 (Endorsed:) Filed Sep. 15, 1903. E. R. Mason, Clerk.

1327 EXHIBIT No. 139. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents: That, whereas, under order and resolution of its Board of Directors Des Moines Suburban Railway Company, a corporation under the laws of the State of Iowa, has entered into a contract with the Des Moines City Railway Company, also a corporation under the laws of the State of Iowa, to convey unto the last named Company all of the privileges, rights, fran-

chises, assets and property of all kinds whatsoever of said Des Moines Suburban Railway Company, the Grantee herein agreeing among other things to assume and pay the floating debts of this Company; and,

Whereas, the stockholders of said Des Moines Suburban Railway Company in meeting duly assembled have ratified and confirmed said agreement.

Now, therefore, in consideration of the covenants and agreements in said contract contained, and in consideration of the delivery to said Des Moines Suburban Railway Company of the consideration in said contract provided to be paid and delivered to it by said Des Moines City Railway Company, the receipt of which is hereby acknowledged, said *Des Moines Suburban Railway Company* has sold, conveyed, assigned and set over, and does hereby sell, convey, assign and set over unto said *Des Moines City Railway Company*, its successors and assigns all of the privileges, rights, franchises, assets and property of all kinds whatsoever, both real personal and mixed, and wherever situated, now owned or belonging to said Des Moines Suburban Railway Company, including all of its lines of street railway and other franchises, rolling stock, cars, car equipment, machinery, tools and implements, and all other property of all kinds whatsoever, whether real or personal, now owned by said Des Moines Suburban Railway Company: the intent being to convey to said Des Moines City Railway Company all of the property, appurtenances, rights and privileges of every kind and
1328 nature belonging to or owned by said Des Moines Suburban Railway Company, whether herein specifically named or not,—subject, however, to a trust deed now resting upon the property of said Des Moines Suburban Railway Company, running to the Iowa Loan and Trust Company, of Des Moines, Iowa, given to secure an issue of bonds of the aggregate principal amount of Three Hundred Thousand Dollars ($300,000).

In witness whereof, Des Moines Suburban Railway Company has hereunto caused its corporate name to be set by its President and its corporate seal to be hereunto affixed by its Secretary, this 28th day of July, A. D. 1893.

DES MOINES SUBURBAN RAILWAY COMPANY,

[SEAL.] By GEO. B. HIPPEE, *President.*

Attest:

G. H. HUTTENLOCHER, *Secretary.*

* * * * * * *

1329 (Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1330 EXHIBIT No. 140. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents: That, whereas, under order and resolutions of its Board of Directors, Des Moines Suburban Railway Company, a corporation under the laws of the State of Iowa, has entered into a contract with the Des Moines City Railway Company, also a corporation under the laws of the state of Iowa, to convey unto the last named Company all of the privileges, rights, franchises, assets and property of all kinds whatsoever of said Des Moines Suburban Railway Company, the Grantee herein agreeing among other things to assume and pay the floating indebtedness of the said Des Moines Suburban Railway Company, And,

Whereas, the stockholders of said Des Moines Suburban Railway Company in meeting duly assembled have ratified and confirmed said agreement,

Now, therefore, in consideration of the covenants and agreements in said contract contained and in consideration of the delivery to said Des Moines Suburban Railway Company of the considerations in said contract provided to be paid and delivered to it by the said Des Moines City Railway Company, the receipt of which is hereby acknowledged, said Des Moines Suburban Railway Company has sold, conveyed, transferred and set over and does hereby sell, convey, transfer and set over unto the said Des Moines City Railway Company, the following described real estate situated in the City of Des Moines County of Polk, and State of Iowa, to-wit:

Lot Six (6) in Block Thirteen (13) Lot Seven (7) in Block Twelve (12) the south thirty three (33) feet of Lot One (1) in Block Eleven (11) the east ten (10) feet of Lot (2) Two and Lot three (3) in Block Seven (7), thirty three (33) feet off of the west side of Lot Nine (9) in Block Fourteen (14), thirty three (33) feet off of the west side of Lot Nine (9) in Block Thirteen (13), all in Hall's Addition now included in and forming a part of the City of Des Moines.

1331 Lots Two (2), Three (3), Seven (7) Nine (9), Ten (10), Eleven (11), and Twenty-one (21), and Lots One (1), Four (4), and Eight (8) east of Alley, and the North half of Lot Eight (8) west of Alley in Polk & Hubbell's Official Plat Lot Two (2) of the East half of the northeast quarter of Section Four (4) township Seventy eight (78) Range Twenty four (24) west 5th P. M.

Lots One (1) Three (3), Four (4), and Five (5) in Water Power place.

Lots Seventeen (17) Eighteen (18), Nineteen (19), Twenty (20) Twenty-two (22) and the west half of Lot Sixteen (16) in Fickel's Sub Division.

A strip thirty (30) feet wide on east side of Lots One (1) Two (2) Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8),

Nine (9), Ten (10), Eleven (11), Twelve (12), and Thirteen (13) (Block 12) and a strip thirty (30) feet wide on the west side of Lots Twelve (12) Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) Eighteen (18), Nineteen (19), Twenty (20) Twenty-one (21), Twenty-two (22), and Twenty-three (23) (Block 14) in Central Place.

Lot Seventy eight (78) in L. A. Twining's Addition.

Lots One (1), Two (2), and Three (3) of Griffith's Out Lots.

Lots Eleven (11) and Twelve (12) in Block Two (2), Lots Eleven (11) and Twelve (12) in Block Three (3), Lots Sixty one (61) and Sixty two (62) in Block Three (3), Lots Eleven (11) and Twelve (12) in Block Six (6), Lots Sixty-one (61) and Sixty two (62) in Block Six (6) Lots Eight (8) and Nine (9) in Block Seven (7), in Old Orchard Beach.

Beginning at the southeast corner of Lot Four (4) of the Official Plat east half of the northeast quarter of Section Four (4), Township seventy eight (78), Range Twenty four (24); thence north on the line of said lot to the northeast corner; thence east to the river; thence south along the river to a point due east of the
1332 point of beginning, thence west to beginning.

Commencing at the northeast corner of Lot Two (2) in Block Seven (7), Hall's Addition; thence east on the same line with Lot Two (2), Sixty-three (63) feet to the northeast corner of Lot Three (3) of the Official Plat of east one half of the northeast quarter Section Four (4), Township Seventy-eight (78) Range Twenty-four (24); thence south one hundred and forty-four (144) feet; thence west sixty-five (65) feet to Block Seven (7); thence north to place of beginning.

Lots Eleven (11), Twelve (12) and Thirteen (13) in Block "C" Woodland Park.

Lots Eleven (11), Twelve (12) and Thirteen (13) in Block "B" West & Burton's Addition.

Lot Thirty-eight (38) in Lyon's Addition to Lyon's Park.

Lots Fifty two (52), fifty-three (53), fifty-four (54), Fifty-five (55), Sixty-two (62) and Sixty-three (63) of White's Sub Division of Lot one (1), Greenwood Park.

To have and to hold unto said Des Moines City Railway Company its successors and assigns, forever.

In witness whereof, Des Moines Suburban Railway Company has hereunto caused its corporate name to be set by its President, and its corporate seal to be hereunto affixed by its Secretary, this 25th day of July, A. D., 1893.

DES MOINES SUBURBAN RAILWAY COMPANY.

(Sgd.) By G. B. HIPPEE, *President.*

[SEAL.]

Attest:

(Sgd.) G. H. HUTTENLOCHER, *Secretary.*

* * * * * * *

1333 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1334 EXHIBIT No. 141. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

Know all men by these presents: That whereas, under order and resolution of its Board of Directors, Des Moines Street Railroad Company, a corporation under the laws of the State of Iowa, has entered into a contract with the Des Moines City Railway Company, also a corporation under the laws of the State of Iowa, to convey unto the last named Company all of the privileges, rights, franchises, assets and property of all kinds whatsoever of said Des Moines Street Railroad Company, the Grantee herein among other things agreeing to assume and pay the floating indebtedness of this Company as the same shall be audited by it, And,

Whereas, the stockholders of said Des Moines Street Railroad Company, in meeting duly assembled have authorized and directed the making of said agreement and this conveyance.

Now, therefore, in consideration of the covenants and agreements in said contract contained, and in consideration of the delivery to said Des Moines Street Railroad Company of the considerations in said Contract provided to be paid and delivered to it by said Des Moines City Railway Company, the receipt of which is hereby acknowledged, said *Des Moines Street Railroad Company* has sold, conveyed assigned and set over and does hereby sell, convey, assign and set over unto said *Des Moines City Railway Company*, its successors and assigns, all of the privileges, rights, franchises, assets and property of all kinds whatsoever, both real, personal and mixed, and wherever situated, now owned or belonging to said Des Moines Street Railroad Company, including all of its lines of street railway and other franchises, rolling stock, cars, car equipments, machinery, tools and implements, and all other property of all kinds whatsoever, whether real or personal, now owned by said Des Moines Street Railroad Company; the intent being to convey to said Des Moines City Railway Company all of the property, appurtenances rights, and privileges of every kind and nature belonging to or owned by said

Des Moines Street Railroad Company, whether herein spe-
1335 cifically named or described or not,—subject, however, to a trust deed now resting upon the property of said Des Moines Street Railroad Company, running to the American Trust and Savings Bank, of Chicago, Illinois, given to secure an issue of bonds of the aggregate principal amount of Six Hundred Thousand Dollars ($600,000).

In witness whereof, Des Moines Street Railroad Company has hereunto caused its corporate name to be set by its President and its corporate seal to be hereunto affixed by its Secretary, this 25th day of July, A. D., 1893.

DES MOINES STREET RAILROAD COMPANY.

[SEAL.] By G. M. HIPPEE, *President.*

Attest:

GEO. B. HIPPEE, *Secretary.*

STATE OF IOWA, *County of Polk*, *ss:*

On this 25 day of July, A. D. 1893, before me, the undersigned a Notary Public within and for said County and State personally came G. M. Hippee and Geo. B. Hippee to me personally known to be the identical person whose name are subscribed to the foregoing instrument as President and Secretary, respectively, of the Des Moines Street Railroad Company, grantor therein named, and personally to me known also to be such officers of said Company and as such officers to be duly authorized to execute the foregoing instrument for and in behalf of the said Company, and severally acknowledged said instrument and the execution thereof to be the voluntary act and deed of said corporation by themselves as such officers thereunto appointed and duly authorized, voluntarily done and executed.

Witness my hand and official seal, the day and year last above written.

[SEAL.] WM. M. WILCOXEN,
Notary Public in and for Polk County, Iowa.

The following endorsement appears on the back of said deed: "Polk County, Iowa, Filed for record Jul- 25, 1893, at 4:51 o'clock P. M. and recorded in Book 294 page 30, Annie E. Hepburn, recorder." 80c."

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1336 EXHIBIT No. 142. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents, That whereas, under order and resolution of its Board of Directors, Des Moines Street Railroad Company, a corporation under the laws of the State of Iowa, has entered into a contract with the Des Moines City Railway Company, also a corporation under the laws of the State of Iowa, to convey unto the last named Company all of the privileges, rights, franchises, assets and property of all kinds whatsoever of said Des Moines Street Railroad Company, the Grantee herein among other things agreeing to assume and pay the floating indebtedness of said Des Moines Street Railroad Company as the same shall be audited by it, and,

Whereas, the stockholders of said Des Moines Street Railroad Company in meeting duly assembled have authorized and directed the making of said agreement and this conveyance,

Now, therefore, in consideration of the covenants and agreements in said contract contained and in consideration of the delivery to said Des Moines Street Railroad Company of the considerations in said contract provided to be paid and delivered to it by said Des Moines City Railway Company, the receipt of which is hereby acknowledged, the said *Des Moines Street Railroad Company* has sold,

conveyed, transferred and set over and does hereby sell, convey, transfer and set over unto said Des Moines City Railway Company the following described real estate situated in the City of Des Moines, County of Polk, and State of Iowa, to-wit:—

Lots Twenty-seven (27) and Twenty-eight (28) in Block Forty-five (45) in Stewart's Addition, also

Lot One (1) in Block One (1) in Marquardt's Addition, now included in and forming a part of the city of Des Moines, Iowa.

To have and to hold unto said Des Moines City Railway
1337 Company its successors and assigns, forever.

In witness whereof, the Des Moines Street Railroad Company has hereunto caused its corporate name to be set by its President, and its corporate seal to be hereunto affixed by its Secretary this 25th day of July A. D. 1893.

DES MOINES STREET RAILROAD COMPANY,
By G. M. HIPPEE, *President.*

Attest:

[SEAL.] GEO. B. HIPPEE, *Secretary.*

1338 STATE OF IOWA, *County of Polk, ss:*

On this 25th day of July A. D., 1893, before me, the undersigned, a Notary Public within and for the said County and State, personally came G. M. Hippee and Geo. B. Hippee, to me personally known to be the identical persons whose names are affixed to the above instrument as President and Secretary, respectively, of the Des Moines Street Railroad Company, grantor therein named, and to me personally known to be such officers, respectively of said Company, and as such officers to be duly authorized to execute the foregoing instrument for and in behalf of said Company, and severally acknowledged the foregoing instrument and the execution thereof to be the voluntary act and deed of said corporation by themselves as such officers thereunto appointed and duly authorized, voluntarily done and executed.

Witness my hand and official seal, the day and year last above written.

WM. M. WILCOXEN,
[SEAL.] *Notary Public in and for Polk County, Iowa.*

Endorsed on the back as follows:—Polk County, Iowa, Filed for record July 26, at 10:1 o'clock A. M. and recorded in Book 294 Page 39, 70¢. Annie E. Hepburn, recorder.

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1339 EXHIBIT No. 143. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance granting to B. F. Elbert, E. R. and J. F. Mason the right to purchase, lease or construct and maintain and operate street railways along, upon, and across the streets and alleys in the town of Grant Park, Polk County, Iowa.

Be it ordained by the council of the incorporated town of Grant Park, Polk County, Iowa:

SECTION 1. That there is hereby granted to B. F. Elbert, E. R. and J. F. Mason, of Des Moines, Iowa, the right to construct, maintain and operate street railways over, along and across the several streets and alleys in the town of Grant Park, Polk County, Iowa, and such streets as may be hereafter laid out in said town, except Dean Avenue, and said persons shall have the right to lay down and maintain a single or double track along and upon said streets, with all switches and turnouts necessary for the operation of said road, and operate their cars over and along said streets with electricity, steam, or other approved power, and such right so to maintain and operate such road shall be exclusive for the period of fifteen years from the date of the passage of this ordinance; provided, that if said persons shall not, within five years from the passage of this ordinance, occupy every alternate street of said town with their road, then and in that event the town council reserves the right to grant to other street railway companies the right to erect and maintain street railways on such alternate streets as are not occupied by said persons or their assigns, or shall not be occupied in six months from the time they shall be notified and required to so occupy the same by said town council.

SEC. 2. The rights hereby granted are upon the express conditions that said persons, their successors or assigns, shall never use said streets or any part thereof, for general railway purposes, or shall allow any other railway company to use their tracks for
1340 such general railway purposes, nor shall they run their cars at a greater rate of speed within said town than twelve miles an hour.

SEC. 3. That in constructing their said road said persons shall lay their track or tracks in the center of said streets, so far as practicable, and shall lay the same to the established grade, where the street has been brought to grade, and where the streets are not brought to grade they may lay their said tracks on a practicable grade, and if said streets are thereafter brought to grade said persons shall bring their tracks to grade at their own expense, and will, when such streets are graded and paved by order of the town of Grant Park, pave the same between their rails, and maintain the same.

SEC. 4. Said persons shall construct and operate their road in a first-class manner, and so as not to unnecessarily obstruct the travel on said streets, and they shall be liable for any and all damages to persons or property resulting from the negligent construction and operation of their road, and will at all times save the town of Grant Park harmless from any and all damages to others growing out of the building and operating said road.

SEC. 5. It is expressly provided that in granting the privileges hereby conferred, the town of Grant Park reserves the right of general police control over said railway, its construction and operation in said town, and the right to regulate the rate of speed at which their cars shall be run; provided, that it shall not require said persons to run their said cars at a less speed than six miles an hour, nor at a greater speed than twelve miles per hour, and it reserves the right to require said persons to construct safe and suitable crossings across their tracks at all street crossings,
1341 and to require said persons to run their cars over their said road once an hour from six o'clock in the morning until eight in the evening and oftener when the business of the road will justify it.

SEC. 6. It is further expressly provided that if said persons shall fail to complete and have in operation one mile of road within said town of Grant Park on or before September 1, 1889, this ordinance shall be void, and the rights and privileges hereby granted shall revert to the incorporated town of Grant Park.

SEC. 7. The cars or carriages operated by said persons, or their assigns, shall be run along and upon said railway in conformity with the following rules and regulations:—

Rule I.

No cars shall be left standing on the streets at any time, except the same are waiting for passengers or other proper purposes.

Rule II.

No cars shall be allowed to stop upon or over a cross walk, at street intersections, except to prevent a collision, or to prevent danger to persons or teams in the streets, or to take on or leave off passengers.

Rule III.

The conductors of said company shall announce the street crossings as they approach the same.

Rule IV.

Cars after sunset shall be provided with proper signal lights.

SEC. 8. Said persons shall not charge a greater rate of fare to or from any point on their line in Grant Park to or from any point on their line in the City of Des Moines, Iowa, than five cents.

SEC. 9. This ordinance shall take effect from and after its pas-

sage, and publication, as required by law, and acceptance by
1342 said persons, which acceptance shall be in writing, within thirty days from the passage and publication of this ordinance, and such publication shall be at the expense of said persons.

I hereby certify that the foregoing is an original ordinance as passed by the Council of Grant Park to Ben F. Elbert, E. R. Mason, and J. F. Mason on October 12, 1888, at which time I was recorder, and I made a copy of the same in the ordinance book of Grant Park.

H. E. MARTIN.

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1343 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1344 EXHIBIT No. 144. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Know all men by these presents: That we *B. F. Elbert, E. R. Mason* and *J. F. Mason*, in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, do hereby give, grant, sell, convey and transfer unto the Des Moines Suburban Railway Company, its successors and assigns, all of our right, title, and interest to and in, and in any way pertaining to the franchises and rights and privileges, all and singular, granted to us, the said grantors, by the incorporated town of Grant Park, by an ordinance passed by the Town Council of said town on the 12th day of October, 1888, granting to us the right to construct, maintain and operate street railways over, along and across the several streets and alleys in said town of Grant Park, Polk County, Iowa, then or thereafter to be laid out in said town, except Dean Avenue; with the right to lay down and maintain a single or double track along and upon said streets, with switches and necessary turnouts, for the operation of said road, and the exclusive right for fifteen years, to operate cars over said road, and along said streets, with electricity, steam or other approved power, it being the intent and purpose of this grant to transfer to and invest said Des Moines Suburban Railway Company with all and singular the rights and privileges with which we are by said ordinance invested and as fully in all respects as we are thereby so invested with the same.

In witness whereof, we the said grantors have hereunto subscribed our names, this 15th day of January, 1889.

B. F. ELBERT.
E. R. MASON.
J. F. MASON.

* * * * * * *

1345 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1346 EXHIBIT No. 145. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the construction and operation of the Des Moines Broad Gauge Railway Company in and along the streets of the incorporated town of Capital Park, Polk County, Iowa.

SECTION 1. Be it ordained by the town council of Capital Park, that consent, permission and authority *is* hereby given and granted to, and duly vested in, the Des Moines Broad Gauge Street Railway Company, and their successors and assigns, to construct, equip maintain and operate for the term of twenty-five (25) years, upon the condition hereinafter stated, a single or double railway track along and over the streets of and within the town of Capital Park hereinafter designated, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turnouts, sidetracks, and switches along the streets, and in constructing and operating said railway said company shall have the right to intersect and cross the track or tracks of any other street or railway.

SEC. 2. The streets specifically referred to in section one (1) hereof are the following: From the south corporation line of Capital Park on Pennsylvania avenue, thence running north on said street to Washington avenue; thence east on Washington avenue, on the north side of the center of said street, to Thirteenth (13) street; thence south on Thirteenth (13) street, to the south corporation line of Capital Park. Also from the west end of Polk Street, running east on Polk street to Thirteenth (13) street, which may be temporarily used until such time as the road is built and operated on Washington avenue; then the track on said Polk street to be removed and vacated by said street railway company, said railway track to be laid to the grade of the streets that are now graded.

1347 On the streets that are not yet graded the railway track shall be laid to the practical grade of the streets, until such time as the trustees of Capital Park shall order said streets to be graded; then the track shall be placed to the proper grade of the street or streets. The roadbed of said street railway between the tracks, shall be filled to the surface of the tracks with cinders, slack or gravel; on the outside of the rail there shall be a plank securely fastened two (2) inches thick and six (6) inches wide, to be laid level with the top surface of the rail and so maintained, said track to — built to the satisfaction of the trustees or a committee of said council.

SEC. 3. The cars or coaches to be used upon the tracks shall be first class and in every respect similar to those used upon the tracks of said company in the city of Des Moines, and shall be operated by animal power, cable or electric power, and no car or carriage used *used* on the tracks of any other company shall be used

upon the tracks of said street railroad unless for temporary convenience. The tracks and cars shall be for transporting passengers and their ordinary baggage only. Provided, said Company shall at all times have the right to use said tracks for transporting material to be used in its construction, repairing and operating said road.

SEC. 4. In the construction of said tracks a T rail may be used until the streets are paved or otherwise improved, at which time the town council may designate the kind of rail to be used for street railway. And said company shall plank the space between the tracks at each street crossing whenever required by the town council, or their committee, and to their satisfaction. When the streets are paved the street railway company shall pave between
1348 their tracks, and they shall restore all streets to as good condition as they were before laying down said tracks.

SEC. 5. Said town of Capital Park shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be caused by the construction of sewers, laying of gas or water pipes, or the necessary repairs of the same, or from the improvement or repairs of any street, unless there be unreasonable delay in making such repairs.

SEC. 6. The tracks of the company shall be laid in the center of the street in all cases where it is practicable to lay them, and except where a double track is contemplated, in which case the tracks may be at such distance from the center of such street as will make the center point between the two tracks the center point of street except on Washington Avenue from Pennsylvania avenue to Thirteenth (13) street the track shall be laid on the north side of the center of said street. Said tracks shall not be laid within twelve (12) feet of the curb line when the same can be practicably avoided, except for the purpose of turning into their stables, car-houses or depots.

SEC. 7. The rate of fare on said railway shall not exceed five (5) cents, and this charter is granted upon the express condition that no additional fare shall be charged for a continuous trip upon any one line operated by said company within and beyond the corporate limits of the town of Capital Park.

SEC. 8. This charter is granted, and the right and privileges herein conferred are subject to the following conditions and qualifications, to-wit: The said street railway company shall commence the construction of the line of track heretofore described in section two (2) on or before the first day of September, 1887, and
1349 have the same operated, and cars running on the same in connection with their line of road in Des Moines by the first day of January, 1888, and the said company shall connect its tracks so laid upon said streets and operate the same in conjunction with the line of street railway in the city of Des Moines to and through the east and west sides of said city; provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given — this section for the completion of said railway.

SEC. 9. The said railway company shall erect a neat and suitable

barn, and keep the same clean (and not create a nuisance) at as near the north end of said line for the purpose of keeping and caring for the horses, cars and implements necessary to work and operate said street railway in a first-class manner. Said company shall start the first cars from the north end of the line at 6 A. M. from March 1st to December 1st of each year, and from December 1st to March 1st, 6:30 A. M.; and the time between cars shall not exceed fifteen minutes running south, and to continue to so run the cars that the last car shall not be stopped running for each day earlier than eleven thirty (11:30) P. M. at the north end of line. The cars run and operated on this line of road shall be properly ventilated and made comfortable in cold weather by fire or other suitable appliances.

SEC. 10. A failure to use any track or tracks and run cars thereon on any street, or part of street, for a period of thirty (30) days, unless unavoidably prevented, shall be deemed an abandonment of such street, or part of street, by said partie- or its assigns, and the town council may, by resolution, declare such street, or part of street, abandoned, and require the said parties, or their as-
1350 signs, to remove their tracks from such street, or part of street. Upon the failure or refusal of said parties to remove such track or tracks when notified to do so, the town council may cause the same to be removed at the expense of said parties, or their assigns. The town council reserves the right to adopt from time to time and to compel compliance therewith, other reasonable rules and regulations relating to the operation of said road.

SEC. 11. Any wilful violation or failure on the part of said street railway company, or its assigns, to fulfill all the requirements contained in this ordinance, after due notice of three (3) days by the mayor of Capital Park, should they so continue to violate the same, shall be deemed a forfeiture of all the rights and privileges granted herein.

SEC. 12. The cars or carriages of the company shall run upon and along the tracks of said company in accordance with the following rules and regulations:

Rule 1. No car shall run at a greater rate of speed than six (6) miles an hour.

Rule 2. While the cars are turning corners the animals attached thereto shall not be driven faster than a walk.

Rule 3. Cars moving in the same direction shall — approach one another nearer than two hundred feet, except in case of unavoidable necessity, or accident, or when near stations.

Rule 4. Cars shall not be left standing on any street at any time unless a tram is attached thereto and the same is waiting for passengers or other proper purpose.

Rule 5. No car shall be allowed to stop upon a cross-walk nor upon any intersecting street, except to prevent collision, or to avoid danger, or to take on or leave off passengers.

1351 Rule 6. The conductors and drivers employed by said company must use all reasonable care and diligence to prevent injury to persons and on the appearance of danger to any one

on or near the tracks the cars must be stopped, if by so doing the injury can be averted.

Rule 7. Reasonable care shall be used by conductors or drivers to prevent injury to teams, wagons and other vehicles.

Rule 8. The conductors or drivers shall use all proper diligence to prevent ladies, and children under twelve (12) years of age, from leaving or entering the cars while the cars are in motion.

Rule 9. Conductors or drivers shall announce to passengers in distinct tones the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company other than said street railway company.

Rule 10. The cars after sunset shall be provided with signal lights.

Rule 11. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at the end of the lines, at which excepted stations they may stand longer.

Rule 12. In any litigation arising out of the grant herein given, the town shall not be liable for any costs or damages growing out of such litigation.

SEC. 13. Within forty (40) days after the passage of this ordinance said company shall file with the recorder of the town of Capital Park a written acceptance of the grant herein above made, with the conditions, regulations and limitations above expressed signed by the president and secretary of said company, and
1352 when so accepted shall operate as a contract between the town of Capital Park and said company. Upon failure to file such acceptance as aforesaid then the above grant shall not become operative to vest any rights, privileges or franchises whatever in said street railway company or its assigns. This ordinance shall take effect and be in full force from and after the expiration of five (5) days publication.

(Signed) W. L. READ, *Mayor.*
Attest: S. W. BAKER, *Recorder*

Copies of the foregoing ordinance were posted up by me in three (3) public places in the town of Capital Park on the 19th day of April, 1887, one of these places being at my residence, the residence of the mayor.

(Sgd.) W. L. READ, *Mayor.*

I, Geo. Rankin, recorder of Capital Park, Polk County, Iowa, hereby certify that the above is a true copy of the ordinances granted to the Des Moines Broad Gauge Street Railway Company as I find it in the ordinance book now in my possession.

GEO. RANKIN, *Recorder.*

Capital Park, Polk County, Iowa, January 28, 1890.

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1353 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1354 EXHIBIT No. 146. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the construction and operation of the Des Moines Street Railroad Company in and along the streets of the incorporated town of Capital Park, Polk County, Iowa.

SECTION 1. Be it ordained by the town council of the incorporated town of Capital Park, that consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railroad Company and their successors and assigns, to construct, equip, maintain and operate for the term of twenty-five (25) years, upon the conditions hereinafter stated, a single or double track railroad along and over the streets of, and within the town of, Capital Park hereinafter designated, and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks and switches along the street. And in constructing and operating said railroad said company shall have the right to intersect and cross the track or tracks of any street or other railroad.

SEC. 2. The streets specifically referred to in section one (1) hereof are the following, viz: From the south corporation line of Capital Park, on Ninth (9th) street, north to Washington avenue, thence east on Washington avenue to Twelfth (12th) street; thence south on Twelfth (12th) street to the south corporation line of Capital Park, said railroad track to be laid to the grade of the streets that are now graded. On the streets that are not yet graded the railroad shall be laid to the practicable grade of the streets until such time as the trustees of Capital Park shall order such streets to be graded. Then the track shall be placed to the proper grade of the street or streets. The road bed of said street railroad between the tracks shall be filled to the surface of the tracks with cinders, slack or gravel. On the outside of the rail there
1355 shall be a plank securely fastened, two inches thick and six inches wide, to be laid level with the top surface of the rail, and so maintained, said track to be built to the satisfaction and acceptance of the trustees or a committee of said council. The tracks laid over and along the streets of Capital Park shall be equal in quality to those used on similar streets in Des Moines.

SEC. 3. The cars or coaches to be used upon the tracks shall be first class and in every respect similar to those used upon the tracks of said company in the city of Des Moines, and shall be operated by animal power, cable or electric power, and no car or carriage used on the tracks of any other company shall be used upon the tracks of said street railroad unless for temporary convenience. The tracks and cars shall be for transporting passengers and their ordinary baggage only. Provided, said Company shall at all times have the

right to use said tracks for transporting material to be used in its construction, repair and operating said road.

SEC. 4. In the construction of said tracks a T rail may be used until the streets are paved or otherwise improved, at which time the town council may designate the kind of rail to be used for said street railroad. And said company shall plank the spaces between the tracks at each street crossing whenever required by the town council, or their committee, and shall keep and maintain the same to their satisfaction. When the streets are paved the street railroad company shall pave between their tracks, and also nine (9) inches on the outside of each rail, or until such time as said road shall adopt as broad guage; then only to pave or improve between the tracks as heretofore stated. And they shall restore all streets to as good condition as they were before laying down said tracks.

SEC. 5. Said town of Capital Park shall not be held liable
1356 to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be caused by the construction of sewers, laying of water or gas pipes, or the necessary repairs of the same, or from the improvements or repair of any street, unless there be unreasonable delay in making such repairs.

SEC. 6. The tracks of the company shall be laid in the center of the streets in all cases where it is practicable to *do* so lay them, and except where a double track is contemplated, in which last case the track may be laid at such distance from the center of such street as will make the center point between the two tracks the center of the street, except on Washington avenue from Ninth (9th) street to Twelfth (12th) street the track shall be laid on the south side of the center of said street. Said track shall not be laid within twelve (12) feet of the curb line, where the same can be practically avoided except for the purpose of turning into their stable, car-house or depot.

SEC. 7. The rate of fare upon said railroad shall not exceed five (5) cents, and this charter is granted upon the express conditions that no additional fare shall be charged for a continuous trip upon any one line operated by said company within and beyond the corporate limits of the town of Capital Park.

SEC. 8. This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications, to-wit: The said street railroad company shall commence the construction of the line of track heretofore described, section two (2), on or before the thirtieth (30th) day after the acceptance of this ordinance, and have the same operated and cars running on the same and completed and in operation on Ninth (9th) street to Washington avenue, in connection with their line in the city
1357 of Des Moines, on or before August 1st, 1887, and on Washington avenue from Ninth (9th) Street to Twelfth (12th) street, and from Washington avenue on Twelfth (12th) to the south corporation line of Capital Park, to connect with their line in the city of Des Moines on or before January 1, 1889. And the said company shall connect its tracks so laid upon said streets and operate the same in connection with the line of said railroad in the city

of Des Moines to and through the east and west sides of said city. Provided, if said company is delayed in the construction of such railroad by order or injunction of any court, or judge thereof, the time of such delay shall be given to such company over and above the time given by this section for the completion of said railroad.

SEC. 9. The said street railroad company shall erect at or near the north end of said line a neat and suitable barn within two years from August 1, 1887, for the purpose of keeping and caring for the horses, cars and implements necessary to work and operate said street railroad in a first class manner. Said company shall start the first cars from the north end of the line, one of said cars on Ninth (9th) street at Six A. M., and one of said cars on Twelfth (12th) street at 6.15 A. M., from March 1st, to December 1st of each year, and from December 1st, to March 1st, the first cars shall start at 6.30 A. M. on Ninth (9th) street and 6:45 on Twelfth (12th) street. The time between cars shall not exceed fifteen minutes running south, and continue to so run the cars until 9:00 P. M., then the cars shall not be more than thirty minutes apart; that the last car shall not be stopped running for each — earlier than eleven thirty (11:30) P. M., at the north end of the line. Provided, that until the expiration of two years from the 1st day of August, 1887, the said railroad company may start the first car from the north end of said — at
1358 6:30 A. M., and thereafter start a car from the north end of said line every thirty minutes until 8 o'clock A. M. The cars run and operated on the line of road shall be properly ventilated and made comfortable in cold weather by fire or other suitable appliance.

SEC. 10. A failure to use any track or tracks and run cars thereon on any street or part of street, unless unavoidably prevented, shall be deemed an abandonment of such street, or part of street, by said parties or their assigns, and the town council may, by resolution declare such street, or part of street, abandoned and require the said parties or their assigns to remove their track, or tracks, from such street, or part of street, and upon the failure or refusal of said parties to remove said track, or tracks, when notified to do so, the town council may cause the same to be removed at the expense of said parties or their assigns. Provided, that any action of the council hereunder may be subject to judicial review. The town council reserves the right to adopt from time to time, and compel compliance therewith, other reasonable police rules and regulations relating to the operation of said road.

SEC. 11. Any wilful violation or failure on the part of said street railroad company or their assigns, to fulfill all the requirements contained in this ordinance after due notice of five (5) days by the mayor of Capital Park, should they so continue to violate, the same shall be deemed a forfeiture of all the rights and privileges granted herein, and any action of the council hereunder may be subject to judicial review.

SEC. 12. The cars or carriages of the company shall be run upon and along the tracks of said railroad in conformity with the following rules and regulations, to-wit:

Rule 1. No car shall be run at a greater rate of speed than
1359 six miles an hour.

Rule 2. While cars are turning corners from one street to another the horses or mules attached thereto shall not be driven faster than a walk.

Rule 3. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred (200) feet except in cases of unavoidable necessity, or accident, or when the cars are near — at stations.

Rule 4. No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purpose.

Rule 5. No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collisions, or to prevent danger to persons in the street, or to take on or leave off passengers.

Rule 6. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the cars shall be stopped, when by so doing such injury may be averted.

Rule 7. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Rule 8. The conductors and drivers shall use proper diligence to prevent ladies, or children under twelve (12) years of age, from leaving or entering the cars while in motion.

Rule 9. Conductors and drivers shall announce to passengers in a distinct tone the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the tracks of any other railroad company.

1360 Rule 10. The cars after sunset shall be provided with signal lights.

Rule 11. No cars shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of any other railroad company; at which excepted stations they may stand a longer time.

SEC. 13. Within five (5) days from the final passage of this ordinance said company shall file with the town recorder a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted this ordinance shall operate as a contract between the town of Capital Park and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

SEC. 14. No Y or switch bar turning cars shall be constructed at any street intersection.

SEC. 15. This ordinance shall take effect, and be in force, from and after the expiration of five (5) days' publication.

(Signed) W. L. READ, *Mayor.*
Attest: S. W. BAKER, *Recorder.*

Copies of the foregoing ordinance were posted up by me in three (3) public places in the town of Capital Park on the 16th day of June, 1887, one of these places being at (my residence) the residence of the mayor.

(Signed) W. L. READ, *Mayor.*

I, George Rankin, recorder of the town of Capital Park, hereby certify that the above is a true copy of the ordinance granted
1361 to the Des Moines Street Railroad Company as I find it in the book of ordinances now in my possession.

GEORGE RANKIN, *Recorder.*

Capital Park, Polk Co., January 30, 1890.

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1362 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1363 EXHIBIT No. 147. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance entitled an ordinance extending and enlarging the rights and powers of the Des Moines Railroad Company in the Town of Capital Park, Polk County, Iowa.

SECTION 1. That consent and permission be and the same is hereby granted to the Des Moines Street Railroad Company to equip its present lines of street railways in the incorporated town of Capital Park, or any extension thereof hereafter made, with electric equipment, and to operate the same with electrical or other *motor* power, except the direct use of steam power, and consent is hereby given to widen the said tracks to the standard *guage* for the said purpose.

SEC. 2. And with a view to inducing said street railroad company to do so, said right hereby granted is made exclusive for a period of ten years (10) from this day; this ordinance to be accepted within ten (10) days from its final passage and publication and thereupon it shall become a contract between said incorporated town and said street railroad company.

SEC. 3. This ordinance shall be in force and effect after its acceptance and the usual publication.

(Signed) A. HOLLAND, *Mayor.*
Attest: GEORGE RANKIN, *Recorder.*

Copies of this ordinance were posted by — in three (3) public places in the town of Capital Park, on the seventh (7th) day of December 1889 one of the places being at the town hall.

GEORGE RANKIN, *Recorder.*

I, Geo. Rankin, recorder of the town of Capital Park, hereby certify that the above is a true copy of the ordinance extending and enlarging the powers, etc. etc., of the Des Moines
1364 & 1365 Street Railroad Company, as I find it in the book of ordinances now in my possession.

GEO. RANKIN, *Recorder.*

Capital Park, Polk County, Iowa, January 30, 1890.

I, Geo. Rankin, recorder of the town of Capital Park, Polk County, Iowa, hereby certify that "An ordinance entitled an ordinance extending and enlarging the rights and powers of the Des Moines Street Railroad Company, in the town of Capital Park, Polk County, Iowa," was published by me, by posting in three (3) conspicuous places (one of them being at the town hall) on the 7th day of December, 1889.

December 12, 1889.

GEO. RANKIN, *Recorder*

DES MOINES, IOWA, *Dec.* 12, 1889.

To the Honorable Mayor and Town Council of the Town of Capital Park:

You are hereby notified that the Des Moines Street Railroad Company has this day accepted the provisions of an ordinance passed by your honorable body on the 5th day of December, 1889, and entitled "An Ordinance extending, and enlarging the rights and powers of the Des Moines Street Railroad Company in the town of Capital Park, Polk County, Iowa."

J. S. POLK, *President.*
GEO. M. HIPPE, *Secretary.*

DEC. 13, 1889.

Received for the town of Capital Park a notice from the Des Moines Street Railroad Company, of which the above is a copy.

GEO. RANKIN, *Recorder.*

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1366 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1367 EXHIBIT No. 148. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

An ordinance authorizing the Des Moines Electric Railway Company to construct, maintain and operate by electric or other motive power other than animal or steam power, on streets, street railroads, in the incorporated town of University Place.

Be it ordained by the Mayor and Town Council of the incorporated town of University Place:

SECTION 1. That consent, permission and authority is hereby granted to and vested in the Des Moines Electric Railway Company, its successors and assigns, to construct, equip and operate for the term of twenty-five years upon the conditions hereafter stated, with electric or other practical motive power, other than animal or steam power, on any street, single or double track, standard four feet eight and one-half inch gauge street railway tracks along and over streets, alleys, viaducts and bridges within said incorporated town, hereinafter designated, and such other streets and alleys as may hereafter be granted to said company by resolution of said council, and to construct maintain and use in connection therewith all necessary and convenient switches and turnouts and convenient and necessary appliances and equipment for said motive power, and upon such alleys only fronting on which said company shall have depots or car barns or electric or other machinery; and said company shall erect the poles for the support of its wires so as not to obstruct the side-walks or traveled portions of the streets.

SEC. 2. The streets and parts of streets herein specifically referred to are as follows:

North street from the east corporation line to Twenty-ninth street, and Twenty-ninth street from North street to Wood avenue; provided said tracks shall be completed on North street and Twenty-

1368 ninth street by the first day of July, 1889, and any parts of such streets not occupied by that time shall revert to the town.

Clark street from the east corporation line to Twenty-fifty street; thence on Twenty-fifth street south to North street; and said company is auhorized to use a T rail until the streets are paved.

SEC. 3. The cars used upon said tracks shall be of the same style and kind used upon the lines of said company in North Des Moines, and the rate of fare shall not exceed five cents for one passage from or to the point of passage in University Place to or from the point of passage in North Des Moines or the City of Des Moines, and the cars used and operated upon the Clark street line in North Des Moines shall be operated upon the streets herein granted, upon which tracks are laid in connection therewith, as frequently as said cars are operated on Clark street in North Des Moines; provided that the cars upon Twenty-fifth street may, by resolution of this council be permitted to run in connection with other lines of said company,

if any are built. And the cars on North street and Twenty-ninth street shall be operated for the first year on schedule time of, one car each way not greater than thirty minutes apart, and after that on such reasonable schedule as the council may prescribe, not less than fifteen minutes apart.

SEC. 4. The right herein granted to lay track upon Clark street shall be limited to the first day of July, 1889, and if by that date none have been laid, it shall be deemed an abandonment of this right, and the said company shall complete its extensions to North street within six months from this date; provided, however, said company shall have the right to complete its tracks upon the streets herein granted within ninety days after such street is placed at a practical grade for the tracks of said company.

1369 SEC. 5. The tracks shall be laid so as to conform to the established grade of any street upon which the road may be built, whether the town has or may hereafter establish the grade of said street. When the streets are not graded the company may lay its track so as to conform to the surface grade of said street; but when the town shall grade said streets the company shall lay its tracks so as to conform to the grade, and in case the town shall at any time pave the streets the company is required to pave at its own expense the space between the rails of its tracks so as to correspond to the improvement of the street outside of its rails and tracks.

SEC. 6. Nothing herein contained shall be construed as a surrender by said town of its right of equitable control over said streets, and the manner and place of laying of the tracks of said company in said streets.

SEC. 7. Said company shall accept the provisions of this ordinance within thirty days after its passage, and upon failure to file such acceptance in writing within that time, it shall be deemed void and of no effect and no right shall vest in said company thereunder.

Passed and ordered published April 1, 1889.

E. DEWEY, *Mayor.*
C. E. McCANNON, *Recorder.*

STATE OF IOWA, *Polk County, ss:*

I, C. E. McCannon, do solemnly swear that I am the recorder of the town of University Place, in the county of Polk and state of Iowa, and that as such recorder I have in my possession all of the records of the proceedings of the town council of said town,

1370 and that I have carefully examined said records, and that the ordinances and proceedings in reference to the Des Moines Electric Railway Company or other street railway companies hereunto attached and known as No. 9 are all the ordinance- of said town council relating to said street railway company or companies from the date of the incorporation of the town on the 26th day of August, 1889.

C. E. McCANNON.

Subscribed and sworn to before me this 26th day of August, 1889.
[SEAL.] EARNEST B. GASTON.

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1371 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1372 EXHIBIT No. 149. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Whereas, The Des Moines Street Railroad Company, in its corporate capacity, and as the assignee of the rights of the Des Moines Electric Railway Company in University Place, under an ordinance passed by this council on the 1st day of April, 1889, and entitled, "An Ordinance authorizing the Des Moines Electric Railway Company to construct and maintain and operate by electric or other motive power, other than animal or steam power, on streets, street railways in the town of University Place," desires to extend its roads in University Place over along and upon the following streets, to-wit:

Twenty-fifth street from the north to the south line of the town, as now laid out and platted, and all extensions thereof that may hereafter be made.

Twenty-fourth street from Clark street to the north line of the town, and such extensions thereof as may hereafter be made in a northerly direction, and University and Clarkson streets from the east to the west line of the town of University Place, and all extensions thereof.

Now, therefore, be it

Resolved, That consent, permission and authority *is* hereby given to said Des Moines Street Railroad Company to build, equip and operate its proposed extensions over, along and upon said streets in accordance with the provisions of said ordinance; provided, however, that said company in case of accident or unavoidable casualty to its power may, during the stoppage of such power, operate the said roads with animal power.

That said proposed extension on Twenty-fifth street shall be made in one year from this date, and the other extensions contemplated herein shall be made in eighteen months from this date.

That the rights so granted to said company shall be ex-
1373 clusive for fifteen years on the streets occupied and for one street on either side thereof.

The above resolutions, presented at an adjourned meeting of the council of the incorporated town of University Place, Polk County, Iowa, February 11, 1890, was passed with the following amendments:

Amendment 1. That the clause referring to the length of time that the exclusive rights are granted to the Des Moines Street Rail-

road Company be made to read "ten years," instead of "fifteen years."

Amendment 2. That the clause referring to the proposed extension of Twenty-fifth street be made to read, "sixty days after the putting of Twenty-fifth street to a four per cent. grade," instead of "one year from this date."

I hereby certify that the above amendments are a true copy of those offered to the foregoing resolution and passed at a meeting of the town council of the town of University Place, February 11, 1890.

J. D. BOTTENFIELD, *Recorder.*

To the Honorable Mayor and Council of the Town of University Place:

GENTLEMEN: You are hereby notified that the Des Moines Street Railroad Company has this day accepted the provisions of a resolution passed by your honorable body the 11th day of February, 1890, granting to this company the right to extend its road on Twenty-fifth street, Twenty-fourth street, Clarkson and University streets, in the town of University Place, said resolution being passed in pursuance of an ordinance heretofore passed by your hon-
1374 orable body granting certain rights to the Des Moines Electrict Railway Company, of which this company is the assignee.

Des Moines, Iowa, Feb. 12, 1890.

J. S. POLK, *President.*
GEO. B. HIPPEE, *Secretary.*

I hereby accept service of the above notice this 12th day of February, 1890.

E. DEWEY,
Mayor University Place,
Polk County, Iowa.

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1375 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1376 EXHIBIT No. 150. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book R, Pages 273 and 274, July 2, 1894.

Resolved, That the Des Moines Railway Co. when it lays its tracks on East Walker from 12th st., East, is authorized to build and maintain the same on the north side of said Walker St. until such street is sewered and the same shall be paved, and when so sewered and paved the said tracks shall be removed to the middle of

the street in accordance with the provisions of Ordinances heretofore granted to said company. Adopted.

(Sgd.) JNO. C. LOPER.

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1377 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1378 EXHIBIT No. 151. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book R, Page 485, February 4, 1895.

An ordinance entitled "An ordinance authorizing the Des Moines City Railway Company to use its railways, tracks, and cars for carrying the United States Mail, express and freight, and for carrying materials for the construction and operation of its roads," was read by title, and Ald. McElderry moved that the following be substituted therefor:

An Ordinance authorizing the Des Moines City Railway Company to use its rails, tracks, and cars for carrying the United States Mail, express and freight, and for carrying material for the construction and operation of its roads.

Be it ordained by the City Council of the City of Des Moines:

SEC. 1. That the tracks, railways and cars now or hereafter owned or operated by the Des Moines City Railway Company, (the assignees of the Des Moines Street Railway Company and all other companies to whom this City and the several cities and towns adjacent thereto and now embraced in and forming a part of the City of Des Moines, heretofore granted certain street Railway franchises) may for the period of 8 years be used by the said City Railway Company, or its assigns, for carrying the United States mail and express matter provided that such express matter shall only be received at and distributed from stations along the line of said Company's roads, which stations shall not be nearer together than one-fourth of a mile.

SEC. 2. Said Company is further authorized to carry freights over the following lines of its roads, to-wit:

Its Belt Line and Sevastopol line, and a connection thereof which connection shall be made by extending its line from the Sevastopol line north along the east side of Front Street to the north line of Locust Street; then northerly along or over the alley run-
1379 ning north and south through block Two (2) of Good's Central Addition to the south line of Grand Avenue; thence northerly across Grand Avenue and Ches-nut street in as nearly a direct line as may be to connect with the Belt Line Railway at or near the point where the Belt Line intersects Commercial Street; provided, however, that until said Railway Company shall obtain

the right-of-way for the connecting line above designated, it is authorized to run its cars for the purpose of conducting said business, West on Commercial Street, to Second street; thence southerly on Second Street to Locust Street; thence East on Locust Street to connect with said line on Front Street.

And it is also authorized to haul freight over and along such extensions of its said Belt Line as may be made to the various industries situated in the north portion of the city, including the Iowa Brick Company and the Flint Brick Co.; and also over and along such extensions as may be made in a southerly direction from the said Sevastopol line. Said Company may run switches from said line on West First Street, west into the several alleys running west therefrom and haul freight over the same, provided said switches shall not run further west along said alleys than West Second Street, and said switches shall be laid with the consent of the parties owning property abutting upon that portion of said alleys in which said switches may be laid.

SEC. 3. Said Company shall also have the power to haul freight over and along the line of its roads from said connecting lines to its power house, which line runs along Locust Street to East Second Street; thence north on East Second Street to Maple street, thence East on Maple Street to East Fourth Street; thence North on east Fourth street to its said power house. It may also run switches from the same through the alleys crossing the same, and it may also connect with the several railways crossed by its railways.

Providing persons owning property abutting on that por-
1380 tion of said alleys which shall be occupied by said switches, shall consent thereto.

It is further provided, that the trains hauling freight along said lines shall not consist of more than one motor car and two other cars.

SEC. 4. That said Company shall annually, on or before the 15th day of December in each year furnish to the City Treasurer a statement of the gross receipts of the Company, arising from the carrying of mail, express matter and freight for the year ending the first day of December of that year, which statement shall be subscribed and sworn to by the Secretary and Treasurer of the said City Railway Company and as a consideration of the privileges herein granted, the said Company for the period of eight years from the date of the acceptance of this Ordinance shall pay into the Treasury of the City of Des Moines, a sum equal to five (5%) per cent. of such gross receipts; said payment to be made by the said company on or before the first day of January immediately following the making of the report above requested.

SEC. 5. That in exercising the privileges herein granted the cars of said Company shall not be operated by steam locomotives or steam motors but by Electricity only, and then the City reserves the right to pass, and the Company shall accept such reasonable rules and regulations for the exercising of the privileges herein granted as the safety and convenience of the people may require.

SEC. 6. This grant is upon the express condition that the said City Railway shall save the City harmless from all damages or

claims for damages arising from or growing out of this grant and exercises thereof, and that the said City Railway Company shall pay all damages to abutting property owners that may under the law be assessed against said railway Company for building and operating its road under this grant, if any.

SEC. 7. The carrying of mail, express and freight through the streets of the City shall be subject to the following restrictions and regulations:

1381 1st. No freight train having more than one car drawn by a motor shall be permitted to run on West Second Street, except between the hours of 6 o'clock P. M. and 6 o'clock A. M.

2d. Freight cars will not be permitted at any time to stop on street crossings.

3d. Freight cars will not be permitted to stand on the public streets for any purpose.

4th. The carrying of mail or express matter must not in any manner hinder or delay passenger cars, and stations for delivery of mail, express and freight must be so situated that the stopping of the cars used for such purposes while loading or unloading will not obstruct the streets or hinder and delay traffic.

5th. The right is expressly reserved to make further reasonable rules and regulations at any time governing the carrying of freight.

6th. In case the Company violates or refuses to make the report as provided in section four, of its gross receipts for carriage of freight, mail and express matter, it shall forfeit the sum of twenty-five (25) dollars per day for each and every day such report is delayed, which sum may be recovered in an action against the Company, or its right under this franchise may be forfeited in the election of the City on giving ten days' notice of such intention.

7th. Any officer or employee of said City Railway Company who violates any of the provisions of this section may be fined the sum of Five (5) dollars and costs for each offence, and may be committed to jail until such fine and costs are paid.

8th. The charge for carrying freight within the City limits shall not exceed Three (3) Dollars per car for any single haul.

SECTION 8. Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charters, and if the charters of any of the said companies expire before eight years then all rights granted by this ordi-

1382 nance shall also expire at the same time.

SECTION 9. That said City Railway Company shall extend its Belt Line track to the plants of the Iowa Brick Company and Flint Brick Company within sixty days from the time each of said companies shall have procured and granted a right-of-way of sufficient width to its plant by the most feasible route to the Iowa Brick Company along the south bank of the river, if right-of-way can be reasonably secured and granted, or to a point upon the north or east bank of the river nearest to its plant, if the Iowa Brick Company shall so elect. The grade to each of said plants not to exceed two per cent.

SECTION 10. This ordinance shall not be of any force or effect unless the Des Moines City Railway Company shall file its acceptance of the same within sixty days of its passage and unless said acceptance is accompanied with a certificate from the City Clerk that the Des Moines City Railway Company has fully complied with all requirements of Section 8 Chapt. 59 of the Revised Ordinance- of the city of Des Moines of 1889 (by building the wall as required by the City Engineer on the east side of the south 216 feet west of Bluff Street, of Lot 2, Official Plat 2½ N. W. ¼ of Three, and E. ½ of N. E. ¼ of Section Four, Township 78, Range 24, and provided further that said City Railway Company in consideration of the privileges granted by this ordinance, shall file with said acceptance a receipt in full for all demands against the City of Des Moines to date for or on account of any and all claims because of moving its tracks on West Eleventh and Twelfth streets in order to permit a sewer to be constructed in 1893, and until said certificate and receipt are filed with said acceptance, this ordinance shall not go into effect.

SECTION 11. That all ordinances, or parts of ordinances, with regard to carrying U. S. Mail, express and freight, only, in conflict with the provisions of this ordinance be, and the same are hereby repealed.

1383 SEC. 12. This ordinance shall take effect and be in force from and after its publication as required, which publication shall be at the expense of the Des Moines City Railway Co.

Ald. Mathis moved to amend Sec. 10 by providing that in lieu of building said retaining wall, the said City Ry. Co. shall deposit with the City Clerk the sum of One Thousand (1,000) dollars to cover the expense of building said wall; The amendment was lost by yeas, Mathis & Wise—2—Nays Garver, Loper, McCartney and McElderry, Sheeley and Wilkins—6—Ald. Hafner not voting.

Ald. McElderry moved to amend Sec. 12 by adding the following: "Provided that the said Des Moines City Ry. Co. shall have complied with all the requirements of this ordinance," and the yeas were Garver, Loper, Macartney, McElderry, Sheeley, Wilkins, Wise, —7—Nays, Hafener, Mathis,—2—and the amendment was adopted.

Ald. McElderry moved that the ordinance do now pass; and the yeas were Macartney, McElderry, Sheeley, Wilkins & Wise,—5—Nays Garver, Hafner, Loper, Mathis—4—. The ordinance was declared to have passed.

The ordinance was then read by title and the same approved.

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1384 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1385 EXHIBIT No. 152. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book R, Page 543, April 1, 1895.

The acceptance, by the Des Moines City Railway Company, of the Freight, Express and Mail Ordinance, "No. 711" passed by the City Council Feb. 4, 1895, together with receipt in full by the said City Railway Company for all claims against the City of Des Moines by reason of having to remove its tracks on West Eleventh and Twelfth Streets to permit the construction of a sewer in 1893; also the certificates of the City Engineer and the City Clerk that said Company had complied with the requirements of said Street Railway Ordinance by erecting a retaining wall on the east side of the South 216 feet, west of Bluff Street, of Lot 2 O. P. West ½, N. W. ¼ of 3 and the E ½ N. E. ¼ of Sec. 4—78—24, as required by Sec. 8, Chap. 59, Revised Ordinances of 1889, was presented, whereupon the following resolution was presented:

Whereas: The Des Moines City Railway Company has complied with Section 10 of an ordinance entitled "An Ordinance authorizing the Des Moines City Railway Company to use its railways, tracks, and cars for the carrying of the United States mail, express and freight, and for carrying material for the construction and operation of its roads," by building the retaining wall as therein required and have also filed a receipt against costs and damages for removing the City Railways Company's track on West Eleventh and Twelfth streets as therein required, and

Whereas, The Des Moines City Railway Company has filed its acceptance of such ordinances and the necessary receipts and certificates showing such facts,

Now, Therefore Be it Resolved,

That such acceptance be received and placed on file, and it is hereby declared binding and in full force as such.

1386 By motion of Ald. Wilkins the resolution was adopted by Yeas 9.

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1387 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1388 EXHIBIT No. 153. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book R, Page 514, March 11, 1895.

Be it Resolved by the City Council of the City of Des Moines:
That we hereby request the Des Moines City Ry. Co. to change the car sign upon the "Belt Line" road to read "Highland Park" that the traveling public may be relieved from the constant inquiries as to the particular part of the city the said Belt Line leads to.
Adopted by Yeas 9, Nays none.

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1389 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1390 EXHIBIT No. 154. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book S, Page 420, June 22, 1896.

Resolved, That the Des Moines Railway Co. be and it is hereby authorized to haul brick or other freight on its freight cars from what is known as its "Belt Line" to its transfer track in East Des Moines on its Scott Street line. The right herein granted is subject to the supervision and control of the City Council, and may be terminated at its pleasure.
Signed Garver, and on his motion adopted with a limit of sixty days as to time. By yeas, Bennett, Garver, Myerly, Well and Wilkins—5—Nays None.

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1391 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1392 EXHIBIT No. 155. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book T, Page 45, October 5, 1896.

Resolved, That the Des Moines City Railway Company be allowed to haul brick on their Scott Street line for the next sixty days, signed Bennett, and on his motion was adopted by Yeas, Bennett, Garver, Loper, Miller, Myerly, Tone, Wilkins—7—Nays Mathis —1.

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1393 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1394 EXHIBIT No. 156. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book U, Page 102, June 6, 1898.

Resolved: That in consideration of the Des Moines City Railway Company's agreement to construct a track from a connection with its present track on West Ninth Street west on Jefferson St. to a connection with its present track on West 13th street in the city of Des Moines, the said City of Des Moines hereby agrees to bring the said Jefferson Street and 13th street, at the intersection of Jefferson Street, to established trade, where said track is to be so constructed, and it appearing that the said Des Moines City Railway Company has now a track on 13th street running from Clark street to Jefferson Street, there is further hereby granted to the said Company the right to maintain both of the said tracks without any obligation on its part to operate its cars over more than one of them except when it is in the opinion of the Company necessary to operate cars on both of said tracks in which event it shall have the right to do so.

(Sgd.) J. P. PATRICK.

Moved by Ald. Patrick to adopt resolution. Motion carried.

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1395 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1396 EXHIBIT No. 157. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Book U, Page 216, November 3, 1898.

Whereas: The Des Moines City Railway Company desires to extend its street car line from its present terminus at East Scott and Twentieth Streets, southward on E. 20th Street to Maury st., and thence eastward on Maury Street to Chesterfield; and

Whereas: It is the universal desire of the people living in the vicinity of Chesterfield and the Starch Works that such extension be made at once, and in such manner as shall leave the widest possible amount of said streets to be improved for a good roadway for general travel and use.

Therefore, Be it Resolved by the City Council of the City of Des Moines:

That the said Des Moines City Railway Company be and is hereby authorized and directed to lay its track and operate the same on the west side of East Twentieth Street from Scott Street south to Maury street, and from the south side of Maury Street from East Twentieth St. eastward to Chesterfield; said railway track to be laid under the

direction of the City Engineer and the center of the same to be not less than sixteen (16') feet distant from the west line of said 20th Street, and the south line of said Maury Street, and in other respects to conform to the ordinances regulating Street Railways, now in force.

Moved by Ald. Loveridge to adopt. Motion carried: Yeas 7; Nays none.

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1397 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1398 & 1399 EXHIBIT No. 158. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

March 28, 1899.

Ordinance No. 960.

An ordinance requiring street railway companies or other persons operating the same to equip and provide their cars with fenders.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That every person or corporation controlling and operating any street railway in the City of Des Moines shall equip the front end of each of its motor cars used in carrying passengers along and over its said road or roads, with a fender of the basket type (similar to the Providence fender, manufactured by the Consolidated Fender Company, of Providence, Rhode Island). Said fenders shall be firmly attached to the front end of said motor cars and maintained thereon at all times when the same are employed in service on its road or roads, to the end that as far as may be, all persons may be protected from injury or damage by coming in collision with said cars.

SECTION 2. That any person or corporation violating this ordinance, upon conviction thereof, shall be fined not less than Ten Dollars ($10.00) nor more than Fifty Dollars ($50.00) for each offense. To run one car for any one day or part thereof, after the time herein provided, without such fender, shall constitute a separate and distinct offence.

SECTION 3. This ordinance shall take effect and be in force from and after the first day of July, 1899, and after it has been published as required by law.

J. P. PATRICK.
J. F. JOHNSTON.
J. G. OLMSTED.

Passed Mar. 28, 1899.
E. W. WOODRUFF, *City Clerk.*

Approved Mar. 30, 1899.
MACVICAR, *Mayor.*

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1400 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1401 EXHIBIT No. 159. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

City Council Proceedings 1898–1899 (not printed).

Page 309, #827.

Be it Resolved by the City Council of the City of Des-Moines:
That the proposition of W. H. Baily to revise the City Ordinances for the sum of $500 be and is hereby accepted, and the City Solicitor is hereby directed to enter into contract to this effect.
Moved by Olmsted to adopt. Motion carried, Yeas 9, Nays, None.

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1402 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1403 EXHIBIT No. 160. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 17, 1899, Page 26.

No. 932. From Mayor.

GENTLEMEN: I return herewith contract with W. H. Baily for revising City Ordinances without approval for the reason that such a contract cannot be entered into except it be countersigned by the Auditor, showing that there is money in fund to meet the obligation.
Respectfully submitted,
(Signed) JOHN MACVICKAR, *Mayor.*

On motion veto was filed, and contract referred to the Auditor for his signature.

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1404 (Endorsed) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1405 EXHIBIT No. 161. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 17, 1899, Page 28.

No. 944. Agreement City of Des Moines with Wm. H. Baily for the revision of the City Ordinances for the sum of $500 re-submitted, countersigned by the City Auditor, was presented.

Moved by Olmsted to approve. Motion carried. Yeas 7, nays none. Hall and Patrick absent.

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1406 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1407 EXHIBIT No. 162. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 5, 1899, Page 97.

No. 1210. From A. J. Ault *et al.*,

Citizens residing in the vicinity of Union Park, asking council to declare the loop at the end of the East Sixth and Ninth Street car line a nuisance, for reasons stated in said petition, presented, and on motion of Johnston referred to Committee on Streets and Alleys.

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1408 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1409 EXHIBIT No. 163. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

July 3, 1899, Page 156.

No. 1429. Railroads.

GENTLEMEN: Your Committee, to whom was referred the petition of A. J. Ault, and others, asking that the loop of the Street Car Company on East Ninth Street near Union Park, be declared a nuisance, would report that they have visited the location referred to and find

the said loop in fair condition and offering very little obstruction to passage of vehicles or pedestrians.

The manager of the Street Car Company promised the committee to raise the planking on the north crossing slightly above the rails, which will make the crossing safe for all kinds of traffic. We would, therefore, recommend that no further action be taken in the matter.

On motion of Johnston report was adopted.

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1410 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1411 EXHIBIT No. 164. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 7, 1899, Page 191.

No. 1560. From Wm. H. Bailey.

Communication requesting extension of time for completion of revision of city ordinances, from September 1st, to November 1st, presented, and on motion of Work request was granted and time extended.

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1412 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1413 EXHIBIT No. 165. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

September 25, 1899, Page 263.

No. 1830. Communication from Wm. H. Baily, relative to revision of ordinances, submitting for consideration of Council thirty-four ordinances as enumerated in his communication, recommending that same be referred to Committee of the Whole, presented and read.

Moved by Olmsted that recommendation of Mr. Baily be adopted, and that ordinance be referred to Committee of the Whole. Motion carried.

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1414 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1415 EXHIBIT No. 166. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

October 18, 1899, Page 287.

1931. An Ordinance entitled: An Ordinance amending an ordinance passed February 4, 1895, entitled "An Ordinance authorizing the Des Moines City Railway Company to use its railway tracks and cars for the carrying of the United States Mail, express and freight, and for carrying material for the construction and operation of its roads" by repealing sections two and three thereof, and enacting substitutes for said repeals sections presented and received its first reading and under the rules laid over.

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1416 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1417 EXHIBIT No. 167. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

October 30, 1899.

No. 2002. An Ordinance entitled An Ordinance to provide for the recording and publication of ordinances, was read the first time.

Moved by Work that the rules requiring that the ordinance be read on three different days be dispensed with, and the ordinance put upon its passage. The vote on the motion was yeas, 7; nays, none, and the motion was declared adopted.

No. 2003. Moved by Olmsted that the ordinance be adopted. The vote on adoption of the ordinance was yeas, 7; nays none, and the ordinance was declared adopted.

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1418 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1419 EXHIBIT No. 168. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

November 17, 1899, Page 358.

No. 2232. An ordinance entitled An Ordinance to provide for the publication of all ordinances and resolutions passed by the Council

and of the proceedings of the Council in pamphlet form, was read the second time, and under the rules laid over.

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1420 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1421 EXHIBIT No. 169. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

December 18, 1899, Page 397.

2375. An Ordinance entitled An Ordinance to provide for the publication of all ordinances and resolutions passed by the Council and of the proceedings of the Council in pamphlet form.

Presented for its third reading.

Moved by Work to amend Section 3, thereof by striking out the words "In the month of January" in line one, and insert after the word "Year" in line two, the words "at the time of advertising for bids for supplies:" and in line five, Section 1, strike out the words "in February" and insert in lieu, "after bids are received." Motion carried. Yeas, 9, nays none, and amendment was declared adopted.

No. 2376. Moved by Work that the rules requiring that an ordinance be read on three different days be dispensed with and the ordinance as amended put upon its passage. The vote on the motion was yeas, 9, nays, none, and the motion was declared adopted.

No. 2377. Moved by Work that the ordinance as amended be adopted. The vote on the adoption of the ordinance as amended was yeas, 9 nays, none and the ordinance as amended was declared adopted.

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1422 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1423 EXHIBIT No. 170. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

December 14, 1899, Page 386.

No. 2335. Communication from Wm. H. Baily, submitting for consideration the revision of the ordinances of the City as arranged by him, preparatory to the publication thereof; also submitting resolution as follows:—

Be it Resolved by the City Council of the City of Des Moines: That the revision of the ordinances of the City as arranged and sub-

mitted by Wm. H. Baily be and it is approved and with any ordinances hereafter passed in time to be included therein is ordered to be published in book form as provided in Section 687 of the Code. Said revision shall be known and designated as The Revised Ordinances of 1900 of the City of Des Moines." There shall also be printed in said book the historical matter and list of officers submitted and the rules and order of business of the Council and an index.

Moved by Olmsted that communication be received and placed on file, and resolution adopted. Motion carried. Yeas 8, nays none.

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1424 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1425 EXHIBIT No. 171. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

December 14, 1899, Page 386.

No. 2336.

Resolved by the City Council of the City of Des Moines: That the revised ordinances of 1900 shall be published in book form herein provided.

1. The leaves shall be six inches wide by nine inches long, the printed matter to be four inches by seven, inches, and the book shall be bound in buff buckram of best quality. Otherwise the quality kind and character of paper, kind and size of type, quality, kind and character of binding, and the workmanship in composition, printing and binding, and all other matters shall correspond with and be the same as the Code of 1897.

2. There shall be printed and bound —— copies of such Revised Ordinances, which shall be distributed as follows: One copy each to the Mayor, each Councilman, the Solicitor, each Assistant Solicitor, each member of the Board of Public Works, City Clerk, Auditor, Treasurer, Engineer, Police Judge, Marshal, Deputy Marshal, Chief of Fire Department, one copy to each Judge of the Supreme Court, each Judge of the Polk County District Court, and the Federal District Judge for Southern District of Iowa; two copies each to the City Library, State Library and Law Library of the State University; one copy to Wm. H. Baily; one copy to each city of the state having a population of 10,000 or more. The balance shall be deposited with the City Clerk to be by him sold at the price of ——, each or to be otherwise disposed of as the Council may from time to time direct. All money received from sales thereof to be paid to the City Treasurer and duplicate receipts taken, one of which shall be filed with the Auditor and credited to the City General Fund.

3. The City Clerk shall at once advertise for two publications each in two daily papers published in the City for sealed proposals
1426 for printing and binding said Revised Ordinances as herein provided, the form of notice to be prepared by the Solicitor, such bids to be filed not later than ten days after the first publication of such notice, and each bid to be accompanied by a certified check or cash deposit in the sum of $50.00 as security that the bidder will enter into contract and furnish a bond with corporate surity in penalty of $1000 to secure performance thereof. The bids received shall be opened in the presence of the Council at the first regular or special meeting after the time for receiving bids expires. The Council shall accept the best bid or may reject any or all bids received. Each proposal shall state the time within which the work will be completed and shall state the estimated number of printed pages on wliich the proposal is based and the amount which the price will be increased or diminished for each page which the book shall vary from the estimate.

4. The contractor shall furnish such number of proofs as the compiler shall require and make all corrections and changes required; the work shall be done under the supervision of the compiler and the committee on printing and subject to approval and acceptance by the City Council, whose decision shall be final.

Moved by Olmsted to adopt resolution. Motion carried. Yeas, 8, Nays none.

No. 2337. Moved by Olmsted that the number of copies be fixed at 300 and that the price to be charged $1.50 each. Motion adopted.

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1427 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1428 EXHIBIT No. 172. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 4, 1900.

No. 507. Petition signed by C. M. Barrie *et al.*, asking that street railway tracks be removed from Jefferson Street and that the street be filled so that no standing water can remain after heavy rains, also petitioning that a sidewalk be placed on State Street between Bluff Street and Arlington avenue and the levy, presented and on motion of Hall referred to Streets and Alleys Committee.

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1429 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1430 EXHIBIT No. 173. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

July 2, 1900.

No. 751. Petition signed by the chairman and secretary of Grand View College, asking that Council use all possible means to secure extension of the East Sixth and Ninth Street line of the city railway to said college or to Hull avenue, presented.

Moved by Bennett that Clerk certify petition to Street Railway Company, with recommendation from Council that prayer be granted. Motion carried. Yeas, 9; nays none.

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1431 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1432 EXHIBIT No. 174. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

July 23, 1900, Page 269.

No. 886. Resolution presented by Hall relative to the railroad company's extension of its loop around the south side of the court house square was read.

Moved by Patrick to refer to Committee of whole. Motion carried.

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1433 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1434 EXHIBIT No. 175. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

CITY CLERK'S OFFICE,
DES MOINES, IOWA, *March* 6, 1906.

STATE OF IOWA, *County of Polk, City of Des Moines:*

I, N. B. Vertrees, City Clerk of said City, hereby certify that the City Council of said City of Des Moines, at a meeting held 31st day of July 1900, among other proceedings of said meeting, the following was adopted:

#955. Resolved, That the resolution passed September 7th, 1899, by the Board of Supervisiors of Polk County, Iowa, and accepted by the Des Moines City Railway Company on the 2d day of October, 1899, a copy of which resolution and acceptance is hereto attached as Exhibits "A" and "B" which consents to the railway company's extension of its loop around the south side of the Court House Square as described in said resolution, and authorizing the said railway company in making said extension, if to it should appear best, to narrow up the sidewalk on the north side of Cherry Street in front of said Court House Square six feet for the purpose of widening out the carriage way in said street and granting certain other rights to said railway company is hereby approved, ratified and confirmed. And said railway company is authorized to extend its said loop as provided for in said resolution and to maintain and operate the same and to narrow up said sidewalk, provided, however, that said extension of said loop and narrowing up of the sidewalk and the widening of the carriage way aforesaid, shall be without expense of the City of Des Moines; the work to be done under the supervision of the Board of Public Works.

(Street Railway Company.)

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Sgd.) N. B. VERTREES, *City Clerk*,
[SEAL.] By GEO. F. POORMAN, *Asst. Clerk*.

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1435 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1436 EXHIBIT No. 176. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

AUDITOR'S OFFICE,
POLK COUNTY, IOWA.

"Whereas, the Board of Supervisors is informed that the Des Moines City Railway Company desires to extend its central loop in West Des Moines around to the south side of the Court House Square, commencing at a point of intersection with its said loop at the corner of West Court Avenue and Fifth Street, thence running such extension south on Fifth Street, to Cherry street, thence north on Sixth to intersect with loop at the corner of Mulberry and Sixth street:

Therefore be it resolved, That, should the Des Moines City Railway Company extend its said central loop as stated above, the Board of Supervisors of Polk County, acting for and in the interest of said county, do hereby propose to release said Railway Company from any claim the county may have against it for payment for the pavement now on said streets or any part thereof, so, occupied by said

extension, under the laws of Iowa, or the ordinances of the City of Des Moines.

Resolved, That we do hereby consent that said railway company should it be granted the right to so extend its central loop by the City of Des Moines, Iowa, may proceed to lay down its tracks in making such extension without depositing the value of said pavement with the City Clerk or other person as by law required. It is, however, understood that this release from the payment for pavement shall only apply to the pavement on said streets and shall not apply to any future pavements on said streets.

1437 Resolved, That for the purpose of widening the carriage way on Cherry street in front of the Des Moines Union Railway Station, between Fifth and Sixth streets, Des Moines, Iowa, we further consent, in the event that said City Railway Company's central loop is extended as hereinbefore stated, that the sidewalk on the north side of that portion of Cherry Street abutting the Court House Square may be narrowed from its present width to six feet provided that the said Des Moines City Railway Company shall at its own expense and without any expense to Polk County, whatever, remove the curb from where it now is on the north side of Cherry Street and place it against the portion of the sidewalk remaining on the north side of said street at the proper grade and in the manner required by the City Engineer of the City of Des Moines, Iowa; and provided further, that said Des Moines City Railway Company shall pave, at its own expense that portion of Cherry street from which said sidewalk is removed, with the materials and in the manner required by the City of Des Moines, Iowa; and the City Engineer; and provided further that the portion of the sidewalk removed shall be taken up without injuring or damaging that portion of the sidewalk remaining, and the portion taken up shall be taken up in squares as marked off by the maker of said walk and said squares to be intact and unbroken and to be delivered by the said Des Moines City Railway Company at such place or places as the auditor of Polk County may indicate, free of expense to said county.

Resolved, That if the said City Railway Company shall extend its central loop as indicated above and shall perform all conditions mentioned and described in these resolutions, we will consent that such extension of such central loop track may be laid and operated on the north side of Cherry street as near as practicable to the north line of said street.

1438 And be it further resolved, That these resolutions so far as they affect the Des Moines City Railway Company shall be and become a contract by and between said company and Polk County, if accepted by said company in writing and the acceptance filed with the auditor of Polk County, Iowa, within thirty days from the passage thereof.

Provided, however, if such extension of said loop is not made within one year from the date of these resolutions, they and the contracts made in pursuance thereof, may at the pleasure of this Board be annulled and set aside.

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(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1439 EXHIBIT No 177. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

September 26, 1900, Page 403.

No. 1274. Petition signed by C. G. Nourse, *et al.*, asking the extension of street car service on Twentieth street as far north as practicable, presented and read, and on motion of Fagen referred to Committee on Water Works and Railroads.

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1440 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1441 To the Honorable City Council of the City of Des Moines, Iowa:

The undersigned, citizens and residents of Twentieth Street and vicinity do hereby petition your Honorable Body to make such orders as will secure the extension of the street car service on said street as far north as practicable.

Names.		
C. C. Nourse,		
Clinton Nourse,		
W. F. Carter,		
E. H. Layman,		
S. W. Corsbie,		
T. M. Walker,		
H. P. Fagen,		Referred September 26, 1900.
C. O. Vigren,		
N. D. Malum,		
J. A. Wilson,		
Geo. L. Holmes,		
E. G. Everett,		
O. B. Pickering,		
T. A. Ray,	Center Coal Co.	
Sam Sheppard,		
Sam Blomb,		
E. G. Pray,		(Petition was granted June 17, 1901.)
J. J. Wilkinson,		
R. M. Pray,		
F. M. Blockman,		
E. E. Emhoff.		

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1442 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1443 EXHIBIT No. 178. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

STATE OF IOWA,
County of Polk, City of Des Moines:

CITY CLERK'S OFFICE,
DES MOINES, IOWA, *March* 6, 1906.

I, N. B. Vertrees, City Clerk of said City, hereby certify that the City Council of said City of Des Moines, at a meeting held 20th day of June, 1901, among other proceedings of said meeting, the following was adopted:

793. Resolved: That the Des Moines City Railway Company be and it is hereby authorized when it extends its tracks on East Walker street and Easton Boulevard to build and maintain the same on the north side of said streets so that the south rail of the said track as laid shall be two and one-half (2½) feet north of the center line of said street.

Moved by Gibson to adopt. Motion carried. Yeas 7, Nays none. Dorr and Hall absent.

DES MOINES CITY RAILWAY CO.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

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1444 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1445 EXHIBIT No. 179. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Oct. 7, 1901, Page 485.

No. 1394. Communication from Geo. F. McKay, trustee, representing certain parties who are desirous of constructing a line of electric railway from the town of Colfax to the City of Des Moines, and in connection therewith to operate their said line of railway into the City and upon certain streets, and ask that Council order the question of granting to said Geo. F. McKay, trustee, his successors or assigns, a franchise to place, construct, maintain and operate poles and electric wires for the use of such street railway along and upon such streets in said City as may be designated by the Council, submitted to a vote of the legal electors of said City, presented and read, and on motion of Dorr received and filed.

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1446 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1447 EXHIBIT No. 180. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

October 7, 1901, Page 485.

No. 1395. Proposed resolution providing for the submission to the legal voters of the City the question of granting franchise to Geo. F. McKay, trustee, his successors, or assigns, to place, construct, maintain and operate poles and electric wires for the use of street railway along and upon such streets of said city as may be designated by the City Council, presented, and on motion of Brereton referred to Committee of the Whole.

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1448 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1449 EXHIBIT No. 181. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Oct. 7, 1901, Page 490.

No. 1412. Report of committee of the Whole on R. C. No. 1395, proposed resolution providing for submission to vote of electors question of granting Geo. F. McKay, trustee, his successors, or assigns, a franchise to place, construct, maintain and operate poles and electric wires for the use of street railway, so to be constructed, along and upon such streets in the City as may be designated by the Council, commending that resolution be referred to Committee on Water-Works and Railroads and Solicitor to report at Friday meeting, presented.

Moved by Hall to adopt. Motion carried. Yeas, 9, Nays, none.

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1450 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1451 EXHIBIT No. 182. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

October 11, 1901, Page 499.

No. 1437. Report of Committee on Water Works and Railroads, presented as follows:

GENTLEMEN: We, your Committee on Water-Works and Railroads to whom was referred No. 1412 report of Committee of the Whole, on R. C. No. 1395, proposed resolution providing for submission to vote of electors question of granting Geo. F. McKay, Trustee, his successors or assigns, a franchise to place, construct, maintain and operate poles and electric wires for the use of street railway so to be constructed, along and upon such streets in the City as may be designated by the Council, recommending that same be referred to this committee respectfully submit the following: That we consider this question of too much importance to the City of Des Moines to be acted upon hastily. We think some proposition should be before the Council that would serve as a basis for an ordinance and that this should appear on the ballot at the special or general election. We, therefore, ask for further time in which to make our report.

(Signed) E. E. DORR.
W. S. HALL.
J. P. PATRICK.

Moved by Brereton to adopt report and request of committee be granted. Motion carried. Yeas, 8; Nays none.

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1452 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1453 EXHIBIT No. 183. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Nov. 8, 1901, Page 544.

No. 1558. Report of Water Works and Railroad Committee on R. C. No. 1395, proposed resolution providing for submission to vote of electors, question of granting to Geo. F. McKay, Trustee, his successors or assigns, a franchise to place, construct, maintain and operate poles and electric wires for the use of street railway, so to be constructed along and upon such streets in the City as may be designated by the Council; submitting ordinance entitled "An ordi-

nance granting to George F. McKay, Trustee, his successors and assigns, the right to construct, maintain and operate street railway in the City of Des Moines, and defining his powers, restrictions, and privileges in that behalf," and recommending certain changes in said ordinance, presented, and on motion of Dorr referred to Committee of the Whole.

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1454 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1455 EXHIBIT No. 184. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Nov. 11, 1901, Page 559.

No. 1612.

Resolution by Brereton.

Be it Resolved by the City Council of the City of Des Moines:
That the applicants for a franchise to operate a street railway in the City of Des Moines be and are hereby instructed to furnish the Mayor and each member of the City Council with a copy of the ordinance they want passed by the Council.
Moved by Brereton to adopt. Motion carried. Yeas 8; nays none.

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1456 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1457 EXHIBIT No. 185. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

December 3, 1901, Page 593.

No. 1704.

Be It Resolved by the City Council of the City of Des Moines That the Committee on Railroads and Water-works be instructed to give no further attention to the new street car franchise until the proposition of 2 per cent. on the gross receipts of the company is complied with.
Moved by Dorr to adopt. Substitute motion by Gibson to refer back to Railroad and Waterworks Committee to ascertain if new railway company will accept franchise on basis of 2 per cent. of gross

receipts revenue to city. Substitute motion lost. Yeas, Gibson, Prunty, (2) Nays Bennett, Brereton, Dorr, Hall, Loveridge, Patrick, (6)

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1458 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1459 EXHIBIT No. 186. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. —.

An ordinance granting to George F. McKay, trustee, his successors and assigns, the right to construct, maintain, and operate a street railway in the City of Des Moines, and defining his powers, restrictions and privileges in that behalf.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That consent, permission and authority *is* hereby given and granted to and vested in George F. McKay, Trustee, his successors and assigns, to construct, own, operate and maintain in connection with an electric railway to the City of Colfax, Iowa, and other points, a single or double track street railway in, through and out of the City of Des Moines, Iowa, upon the following named streets, alleys, public places and highways of said city, and upon and across such bridges and viaducts as may be necessary.

And upon, over and across such other streets, bridges, alleys, public places and highways, as the City Council may from time to time authorize, to-wit:

From a point where East avenue intersects North Street, thence west on North Street to Beloit Street, south on Beloit Street to Claypool avenue, west on Claypool avenue to Twenty-first Street, south on Twenty-first Street to Des Moines Street, west on Des Moines Street to Eighteenth Street, south on Eighteenth Street to Capitol avenue, west on Capitol Avenue to East Eleventh Street, north on Eleventh Street to Des Moines Street, west on Des Moines Street to Ninth Street, south on Ninth Street to Grand Avenue, west on Grand Avenue and across the Grand Avenue Bridge to West Seventh Street, north on West Seventh Street to University Avenue, West on University Avenue to Twenty-third Street, north on Twenty-third Street to Carpenter Avenue, west on Carpenter Avenue to Twenty-fifth Street, north on Twenty-fifth street to Forest Avenue,
West on Forest Avenue to Thirty-fifth Street; also
1460 from the intersection of Seventh Street and University Avenue north on Seventh Street to Franklin Avenue, east on Franklin avenue to Sixth Avenue north on Sixth Avenue and across the Sixth Avenue Bridge to the City Limits; also from the intersection of East Avenue with North street north on East Avenue to

Easton Boulevard and east on Easton Boulevard to the City Limits; or from the said intersection of East Avenue with North street north to State Street, thence east on State Street to Summit Street, thence on south Summit Street to North Street, thence east on North Street to the east city limits; or from a point on North Street to be determined by George F. McKay, Trustee, his successors and assigns, to the east city limits over a private right of way to be acquired by him and across intervening streets and alleys.

There is reserved to the City Council the right and power, by resolution or ordinance, to require the said George F. McKay, Trustee, his successors and assigns, to construct, equip, and operate as a part of said street railway system, tracks and lines in a reasonable mileage upon other streets, bridges, alleys, public places and highways than as above designated, to and through such parts and populous districts of the City where the conditions and population are such that the line so required to be constructed will be remunerative.

SECTION 2. Said grantee, his successors and assigns, are hereby granted the right to use, upon the whole or any part of said railway, electricity only as a motive power supplied by means of overhead trolley wires, the electrical circuit being completed by the rails of the road suitable connected at their ends, or connected with a supplementary ground wire. Said circuits shall be constructed in the most approved manner to prevent, as far as possible, electrolysis or injury to underground water, gas or other pipes, and for such purposes shall at all times be maintained by said grantee, his successors and assigns under the supervision and in such manner as directed by the City Council. And for this purpose said grantee
1461 is expressly authorized to lay and connect said ground circuit as aforesaid and to erect and maintain in and along any and all of the public streets and highways upon which the tracks of said railway are or may be authorized and constructed, such poles, wires and fixtures as may be required to support and maintain the overhead trolley and feed wires. For such support and maintenance, horizontal cross wires extending across the street may be employed. All such poles used in such construction may be of iron or cedar, and if of cedar, they shall be shaved and painted and reasonably straight, placed within and adjacent to the line of the curb of the sidewalk, securely and firmly set at such depth in the ground as to make their support substantial and adequate, and cross wires for the support of the trolley wire, shall be attached to said poles at such height as to maintain said trolley wire not less than eighteen feet above the surface of the street. All such posts and fixtures of said railway, when completed, shall be maintained by said grantee his successors and assigns, at all times in good order, to the satisfaction of the City Engineer; and wires shall in no case be fastened to or interfere with shade trees or unreasonably impede public travel and shall be so as to best suit the public convenience and inhabitants of said city. All trolley wires shall be protected by proper guard wires and in case iron poles are used, they shall be of

such character and design as the City Council shall designate by resolution.

Provided however, that there is reserved to the City Council the right, at any time after the expiration of three years from the date of acceptance of this ordinance, to require all feed wires to be placed in underground conduits in the business portion of the city.

SECTION 3. The gauge of the track shall be four feet eight and one-half inches. All rails may be of the style knows as —, rail, at the option of said City Council. The laying of the same shall be on sound ties, placed not to exceed two feet apart, center
1462 to center, and the work done subject to the inspection and approval of the City Engineer, and shall be laid and maintained in such manner as not to obstruct the free passage of vehicles over the same, and the upper surface of the track shall be laid flush with the surface of the streets, and such tracks shall conform to the grade of the street as established when laid, or as may be from time to time established or altered, and in case of paving, macadamizing, grading, or for any other purpose, it shall be deemed necessary to relay said rails, the same shall be relaid by and at the expense of said grantee, his successors and assigns, and in the streets, lanes or avenues, alleys or public places, which are not paved, the rails shall be laid in such manner as shall least interfere with public travel thereon, and subject to the approval of the City Engineer.

SECTION 4. In the construction of said railway, unless specially authorized by the Council to the contrary, the tracks of the railway hereby authorized shall be laid in the center of the street, and in case double track shall be authorized by said Council, the inner rail of such tracks shall be laid within two and one-half feet of the center of the street.

SECTION 5. Said grantee, his successors and assigns, shall be required to keep the surface of the street inside of the rails and one foot in width on the outside, in good order and repair, and even with the top of the rails of said track, and on unpaved streets to plank the outside and inside tracks, and between all tracks on principal street and highway crossings, the planking on the outside of the rail to extend one and one-half feet from the rail; and said grantee his successors and assigns, shall be required to plank in the same manner at such other highway and street crossings as the Council may from time to time order. Said grantee, his successors and assigns, shall restore all pavement removed or displaced in relaying or making said tracks to its former condition as near as may be, at
1463 their own expense, and subject to the approval of the City Engineer. Whenever the City Council shall order a street paved it shall be the duty of said grantee, his successors and assigns, to pave, or to pay the expense of paving, between the rails and tracks, and outside the tracks extending one foot on each side, and also that portion between the tracks where double tracks, turnouts, or switches are placed, and to keep such pavement in repair, Said g-antee, his successors and assigns, shall at his own expense also remove, within twenty four hours, or level all ridges or banks of snow or ice that shall be formed between the rails or tracks, such snow

and ice to be evenly distributed over the surface of the street so as to least obstruct public travel thereon.

SECTION 6. The equipment of said railway shall be first class in every respect; all cars shall be new and of modern design, to be kept well lighted, with colored light in front and rear, and embracing the usual modern improvements for convenience, comfort and safety, including smoking department and also water closet on cars to be run out of the city, but water closets shall be kept closed while cars are passing over streets in the city, and shall be neatly and comfortably furnished. Said Council may from time to time require the use of such fixtures and appliances upon said road, plant and cars, as may be deemed necessary to public safety and convenience in the operation of said road.

SECTION 7. It is understood that the Mayor or City Council shall have the right to temporarily suspend the running of cars during fires, riots or times of public danger.

SECTION 8. The cars on said railway shall be run as often as public convenience shall require. Mornings and evenings, during the time people are going to and from work, cars shall be run oftener, it being the aim of said grantee to give every patron a seat at all times. The rate of fare to be charged shall be as follows: For a single fare five cents; six tickets for twenty-five cents; children under six years of age free when accompanied by parent or guardian. Tickets to be issued to any persons applying for the same on the cars or at office of the grantee, his successors and assigns. And transfer slips shall be given by conductor to passengers without extra charge, permitting them to ride on any of its — except such as parallel the lines on which the transfer was received, within the distance of four blocks. The rate of speed at which the cars may be run upon said railway, shall be such as may from time to time — fixed by the Council, either by resolution or ordinance.

1464

SECTION 9. Cars shall not be stopped on a crosswalk or in front of any intersecting street, except to avoid collisions or prevent danger to persons or property in the street, and when any car is required to stop at street intersections to receive or discharge passengers, the car shall be stopped so as to leave the rear platform slightly in the crossing. All crossings shall be called by the conductor before reached, and cars shall stop at all crossings when signalled by passengers. Said Grantee, his successors and assigns, shall employ careful, prudent, sober and competent agents to take charge of their cars while on the road, and it shall be the duty of all such agents and employees to keep vigilant watch for all trains, persons on foot, carriages and especially children, either upon the track or moving toward it, and for locomotives and trains of cars at railway crossings, and at any appearance of danger the cars shall be stopped as quickly as possible and every precaution taken to avoid injury, and have derailing switches at all railroad crossings, if Council so directed.

SECTION 10. Cars shall be at all time- entitled to the track and any vehicle upon the track of said railway shall turn out upon the approach of a car so as to leave the track unobstructed, and the

driver of any vehicle neglecting or refusing so to do, or any person wilfully or negligently obstructing said track shall be deemed guilty of a misdemeanor and on conviction be fined in any sum not exceeding fifty dollars nor less than five dollars.

1465 SECTION 11. Whenever gas or sewer pipes have been laid in any of the streets, lanes, avenues, or highways of said city, occupied by said railway, said railway must be maintained subject to the rights of the city, and the respective companies owning the same, to take up, repair, remove or renew such gas, water or sewer pipes, or conduits, without being liable to said grantee, his successors and assigns, for any damage whatever on account thereof.

Provided, however, that such taking up, repairing, removing or renewing of such pipes or sewers shall be done at the expense of the owners thereof, and in such manner as not unnecessarily to damage said railway or interfere unnecessarily with the operation thereof.

SECTION 12. Said City reserves to itself the right to hereafter lay down, repair, remove, renew, or permit the same to be done in said streets, gas, water pipes, sewers, conduits, whenever public convenience may require. Provided that in case it becomes necessary to excavate under the tracks of said railway, persons so excavating shall do so with the least possible delay.

SECTION 13. The officials of the Fire Department of said city shall have the power to cut (temporarily) without liability on the city for repairs, any wire or wires of said grantee, his successors and assigns, whenever deemed necessary for the city's interests during the prevalence of a fire or conflagration, and said Fire Department shall have the right to use any of the poles and wires of said railway whenever and wherever deemed desirable, for the use of said department free of charge, such use, however, not to be of such character as to deprive said grantee, his successors and assigns from using the same except as above set forth.

SECTION 14. By the acceptance of the authority and permission hereby granted, said grantee, his successors and assigns, hereby agree to indemnify and save harmless said City of Des Moines from any loss or expense to which it may be subjected by any one

1466 in his, her, or its person or property, by reason of the construction and operation of said railway, or by the use of the motive power thereon, or by reason of negligence, carelessness or omission of said grantee, his successors and assigns, or their officials, servants or agents, and said grantee, his successors and assigns, shall be liable to said City of Des Moines for all cost or damage suffered by or recovered against it in consequence of any act, neglect or default of said grantee, his successors and assigns, or from any breach of duty on their part of their officers, agents or employees, under the provisions of this ordinance.

SECTION 15. Said grantee, his successors and assigns, are hereby authorized to transport and carry over said railways United States Mail and also light freight, express parcels and such other articles of commerce, not to exceed one hundred and fifty (150) pounds in weight, as are usually transported along public streets; at such rate as may be agreed upon with shippers, such rates to be uniform and

no preference to be given to any person directly or indirectly but the privilege to so transport merchandise over said roads shall at all times be subject to regulation by the City Council.

SECTION 16. The said George F. McKay, his successors and assigns, after one year from the time this ordinance becomes effective and in operation by acceptance thereof as therein provided, after its necessary provisions have been authorized and approved by a vote of the electors of the City as provided by law and for a period of two years thereafter, shall annually, on the first day of July, pay to the City of Des Moines one per cent. of its gross receipts as herein defined and shall, after the expiration of said period of two years, annually, on the first day of July, pay to the said City two per cent. of its said gross receipts for the year preceding, ending June 1st. Gross receipts upon which said payment is required are, for the purpose of this ordinance defined to include only the following:

1467 All receipts from traffic from and to points within the city limits; three cents of all fares received from passengers from points within to points without and from points outside to points within the city limits; and such part and portion of receipts from freight and express business and for carrying United States mails carried from points with- to points without and from points without to points within bears to the whole distance transported. A statement sworn to by the said George F. McKay, Trustee, his successors, or by the secretary, treasurer or other person or managing officer of such corporation, partnership or individuals as may be in operation of said line of railway shall accompany each of said payments and shall show the receipts therein defined as gross receipts and which said statement shall be filed with the treasurer of the city.

The City Council or any officer of the City or person authorized by resolution of the City Council, shall have authority and power from time to time to make examinations of the books, accounts and car fare registers of the said street railway system for the purpose of determining that the payment of said percentage has been fairly and correctly made, and in case of refusal or neglect to permit such examination, the said George F. McKay, Trustee, his successors and assigns, shall pay a penalty of one hundred dollars for each and every day he shall so neglect or refuse to permit such examination which said forefeiture shall be recovered in an action therefor.

SECTION 17. Said grantee, his successors and assigns, may, with the consent of the City Council, abandon any of the lines herein contemplated, and if such abandonment takes place after tracks have been built said grantee, his successors, and assigns, must restore the streets wherever such tracks may be taken up to their former condition, safe and convenient for public travel, and in all respects as good as before said tracks have been laid.

1468 SECTION 18. Said City Council reserves the right to amend this ordinance in any of its regulatory provisions, and to make such other and further reasonable rules and regulations in regard to the operation of said railway as may from time to time be deemed necessary and appropriate and for the interest of said City of Des Moines.

SECTION 19. This franchise, as granted, and the rights and privileges herein conferred, are subject to the following conditions, limitations and qualifications, to-wit: The said George F. McKay, Trustee, his successors and assigns, shall begin the construction of the line of railway within the City of Des Moines, hereby authorized, within eight months from the date of acceptance of this ordinance, and shall within eighteen months of the date of said acceptance have five miles of track laid, and within eighteen months thereafter have laid all the lines of railway within the City of Des Moines authorized by this ordinance complete and equipped and cars running thereon, and the said George F. McKay, Trustee, his successors and assigns, shall also within eight months from the date of the acceptance of this ordinance, begin the construction of said line of railway to Colfax, Iowa, and have the same completed and cars running thereon within two and one-half years from the date of the acceptance of this ordinance. Provided, however, that if the said George F. McKay, Trustee, his successors and assigns, shall be delayed and prevented by litigation, by injunction, or other process of court from commencing or continuing the work of construction and equipping said railway, the period above limited shall be extended for such further period as the said George F. McKay, Trustee, his successors and assigns, may have been so prevented and delayed.

SECTION 20. The adoption of this ordinance shall not operate to grant to or vest in the said George F. McKay, Trustee, his successors and assigns, a franchise for the use of the streets,
1469 highways, avenues, alleys, bridges and public places in the City of Des Moines, for said street railway electric wires, poles and other support thereof, until and unless upon the submission as required by law of the question of granting said franchise at a general or special election called for that purpose, a majority of the legal electors of the city voting thereon vote in favor thereof, whereupon the same shall be operative and effective for that purpose.

SECTION 21. Within ninety (90) days from the publication of this ordinance, said George F. McKay, Trustee, his successors and assigns, shall file with the City Clerk of the City of Des Moines, a written acceptance of the same and of the grants herein made, with the conditions, limitations, and regulations herein expressed, and when so accepted, this ordinance shall operate as a contract between the said City of Des Moines and the said George F. McKay, Trustee, his successors and assigns; and upon the failure to so file such acceptance as aforesaid, then the said ordinance shall not become operative to vest any rights and privileges of franchise whatever.

SECTION 22. This ordinance shall take effect, and be in force from and after its publication as provided by law, provided the same be accepted within the time stipulated.

1470 The above and foregoing pages contain a full and true and perfect copy of the ordinance purporting to grant the right to George F. McKay, Trustee, his successors and assigns, to maintain and operate a street railway in the City of Des Moines and de-

fining his powers, restrictions and privileges in that behalf, which was heretofore, to-wit: on the 3rd day of February, A. D. 1902, filed before the Council and was submitted to the Committee of the Whole for consideration, and which after being considered for a time was withdrawn on the 24 day of February by William L. Read, his attorney.

Witness my hand and the seal of the city this 17th day of March, 1902.

[SEAL.] (Sgd.) E. R. BENNETT,
City Clerk.

(Endorsed:) Filed Sept. 15, 1906. E. R. Mason, Clerk.

1471 EXHIBIT No. 187. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

December 10, 1901, Page 692.

No. 1718. An Ordinance entitled "An Ordinance providing for the improvement of Kingman boulevard, and repealing sections 2, 4 and 5 of ordinance No. 768," presented and received its third reading; to which was attached petition signed by W. V. Wilcox, *et al.*, protesting against the passage of said ordinance, also petition signed by M. L. Macomber, *et al.*, petitioning the passage of said ordinance.

Moved by Patrick that said ordinance be amended by adding thereto the following:

"SECTION 3. When said boulevard is paved or otherwise improved, the Street Railway Company accepting this ordinance shall be required to bear the entire expense for curbing on both sides of said park; provided, that unless this ordinance is accepted in writing by the Street Railway Company within twenty days after its passage, and unless the said company lays tracks as far west as Thirty-fifth street by July 1, 1902, then, in that event, the Street Railway Company is forbidden to place its tracks upon said street."

Motion carried. Yeas 7; nays none; Hall absent, and amendment declared adopted.

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1472 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1473 EXHIBIT No. 188. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Jan. 23, 1902, Page 671.

No. 1916. Communication from Board of Public Works stating that new tracks have been placed in pavements as follows: One Grand avenue, west of Fourteenth street, side track; the "Y" at N. E. Corner of West Second and Locust streets; from Court Avenue to Cherry street on Fifth street; on Cherry street from Fifth street to Sixth avenue; on Sixth avenue from Cherry street to about one-half block north; one block on University avenue between Twenty-ninth and Thirty-first streets; and that the Des Moines City Railway Company have failed to comply with the provisions of the Code and ordinances relating to same; submitting letter from F. M. Hubbell requesting Board to take the necessary steps to ascertain the cost of pavement torn up on Grand avenue, west of Fourteenth street, and to notify the said Street Railway Company to make the necessary deposit, presented, and on motion of Gibson referred to Committee of the Whole.

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1474 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1475 EXHIBIT No. 189. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

March 14, 1902, Page 764.

No. 2166, by Dorr.

Be it resolved by the City Council of the City of Des Moines That the city solicitor be instructed to prepare a resolution directing the Des Moines City Railway Company to utilize that portion of Second street from Locust street to Walnut street, and the removal of their tracks from in front of the Library building.

Moved by Dorr to adopt. Motion carried. Yeas 6, Nays none.

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1476 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1477 EXHIBIT No. 190. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 4, 1902, Page 40.

Ordinance No. 1155.

An ordinance to straighten Seventeenth Street between Grand Avenue and Ingersoll Avenue.

Be it ordained by the City Council of the City of Des Moines:

That in consideration of the dedication by Lowell Chamberlain for street purposes and for the purpose of straightening and widening Seventeenth street between Grand Avenue and High street in the City of Des Moines and the execution of a deed to the City of Des Moines for all that strip of ground at or near the east end of Lot No. 4 of the Official Plat of the S. E. ¼ of Section 5, Twp. 78, Range 24, West 5th P. M. Iowa, described as follows, to-wit:

Commence at a point 22 feet west of the southeast corner of lot "C" of J. C. Savery's Addition to the City of Des Moines, and run thence south 31 feet; then south 27 degrees 30 minutes to the northwest corner of Grand Avenue and Seventeenth Street; then run north 15 degrees West 344½ feet to the south line of Lot No. 1 in block "D" of the Sub-division of lot No. 6 of the Pursley estate; then run west 64 feet to the place of beginning, the same being in the City of Des Moines.

And the further consideration of the dedication by F. M. Hubbell for like purpose, and the execution of a deed by him to the City of Des Moines of a triangular piece of ground off the south-east corner of lot No. 1 in block "D" of the sub-division of lot No. 6 of the Pursley estate by the Pursley heirs; and the said City of Des Moines hereby vacates all that portion of Seventeenth street lying east of a line drawn from the southwest corner of Lot No. 5 in block No. 46 of J. Lyon's Addition to Fort Des Moines, North 27 degrees 30 minutes westerly to the south line of said lot No. — in block "D" of the Subdivision of lot No. 6 of the Purley estate, and all right, title and interest of the said city of Des Moines in and to the same is hereby ceded to the respective owners of the following property, is hereby ceded to the following abutting property owners, to-wit: to F. M. Hubbell, owning lot No. 6 of the O. P. of the S. ½ of the S. E. ¼ of Sec. 5, township 78, range 24, and lot No. 1 of the O. P. of lots 3 and 4, block 46 of J. Lyon's Addition to Fort Des Moines, the track in front of his said lots.

1478 & 1479

To Jefferson S. Polk, or his grantee, owner of lot No. 2, of the official Plat of lots No. 3 and 4 in block 46 of J. Lyon's Addition to Fort Des Moines, that portion in front of his said lot.

To C. Huttenlocher, owner of lot No. 5 in block No. 46 of J. Lyon's addition to Fort Des Moines that portion of said vacant tract along side of said lot.

That the Mayor of said City of Des Moines is hereby authorized and directed to execute and deliver to said above named owners a deed conveying all the right, title and interest of the said City of Des Moines to the said designated property, provided, that in consideration thereof the said Lowell Chamberlain and F. M. Hubbell shall execute and deliver to the City of Des Moines the proper conveyance to said City of Des Moines for the property first herein described.

Passed April 4, 1902.
Approved April 5, 1902.

J. J. HARTENBOWER, *Mayor.*

Attest:
E. R. BENNETT, *City Clerk.*

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above and foregoing ordinance No. 1155 was passed by the City Council at a meeting held April 4, 1902, and approved by the Mayor April 5, 1902.

E. R. BENNETT, *City Clerk.*

Published as provided by law May 26, 1902.

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1480 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1481 EXHIBIT No. 191. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 5, 1902, Page 462.

Ordinance No. 1175,

An ordinance granting to the Des Moines City Railway Company the right to transfer freight and express matter over its roads extending east from the Chicago & Great Western Railroad, along Walnut Street to the State Fair Grounds, and from the terminus of the Inter-Urban Railway at or near Grand View Park to said State Fair Grounds.

Whereas: The Chicago & Great Western Railway Company has for the convenience of the State Fair, its patrons and others constructed switches connecting its said road with the Des Moines City Railway on East Walnut Street, Des Moines, Iowa, for the purpose of transferring exhibits and other freight and express matter to or in the vicinity of the State Fair Grounds; and

Whereas: The Inter-Urban Railway Company has made a connection with the Des Moines City Railway at or near Grand View Park, and is desirous of using the tracks of the Des Moines City Railway Company to transport passengers, freight and express matter from said Inter-Urban Railway to or in the vicinity of the State Fair Grounds; and

Whereas: The City of Des Moines desires to make all reasonable concessions to said State Fair, its exhibitors and others who may wish to visit the same. Now, Therefore,

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That the Des Moines City Railway Company be and it is hereby fully authorized and empowered to use its tracks on East 20th and East Walnut streets from its connection with the Chicago & Great Western Railway to or in the vicinity of the State Fair Grounds, and its track or tracks from the point of its connection with the Inter-Urban Railway at or near Grand View Park, which tracks run along East Thirtieth Street from Walnut Street to West North Street; thence east along West North Street to Eastern Boulevard thence north along Eastern Boulevard and the private right of way of the said Des Moines City Railway Company to the point where the said Des Moines City Railway Company's track or tracks intersect the Inter-Urban Railway Company's track or tracks, for the purpose of transporting passengers, freight or express matter either on the cars of said Chicago & Great Western Railway Company or the cars of the Inter-Urban Railway Company, or on its own cars or any other cars that may be used on any of said roads from the points of junction above mentioned with said roads to or in the vicinity of the State Fair Grounds, or to any points between said points of junction from the first day of August to the 30th day of September, 1902.

1482 & 1483

SECTION 2. That the said Des Moines City Railway Company shall have the right to charge such reasonable rates for transporting such freight and express over its said roads as it may from time to time determine. Its rates, however, shall not exceed the rates authorized under the statutes of the State of Iowa to be charged for similar services.

SECTION 3. That all cars shall be hauled, pushed or propelled by electric power.

SECTION 4. All parts of ordinances of the City of Des Moines which are in conflict with the provisions of this ordinance are hereby suspended so far as they may affect the provisions of this ordinance or be in conflict therewith, but not otherwise. That the City of Des Moines reserves the right to amend or repeal this ordinance.

SECTION 5. This ordinance shall take effect from and after its publication as required by law. Such publication to be at the expense of the Des Moines City Railway Company.

(Signed) J. M. BRENTON, *Mayor.*

Passed Aug. 4, 1902. Approved Aug. 7, 1902.

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above and foregoing Ordinance No. 1175 was passed by the City Council at a meeting held August 4, 1902, and approved by the Mayor, August 7, 1902.

Published as provided by law. August 25, 1902. City Clerk.

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1484 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1485 EXHIBIT No. 192. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 20, 1903, Page 81.

No. 139. Communication from Board of Public Works and City Engineer presented as follows:

GENTLEMEN: The Des Moines Street Railway Co. has filed with us a written notice of its intention to lay an additional track on West Grand Avenue from Fourteenth street to Seventeenth Street. We have examined the pavement, as provided by section 792 of the Revised Ordinances of the City of Des Moines of 1900, (Ordinance No. 1063) and find that the same was laid in December, 1893, at a cost of $1.49 per yard. Said pavement is in bad condition, and the street should be repaved in the near future; it is a two course work on sand. Accompanying report you will find plat and schedule. Our estimate of the value of said pavement is that it is of little, if any, value, and that it is unfit to be relaid and should be replaced by No. 1 vitrified brick.

(Signed) B. O. HANGER,
W. W. WISE,
Board of Public Works.
JOHN BUDD,
City Engineer.

Moved by Brereton that the request of the Des Moines Street Railway Company be granted in accordance with recommendation of the Board of Public Works and City Engineer. Motion carried. Yeas; Brereton, Harley, Prunty, Smith, Whitney, (5) Nays, None; Fraley, Higgins, King, Van Dyck, (4) absent.

No. 140. On Motion of Whitney, Council adjourned.

E. R. BENNETT,
City Clerk.

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1486 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1487 EXHIBIT No. 193. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

April 27, 1903, Page 130.

No. 197.

Resolution by Whitney.

Whereas, The Des Moines City Railway Company and its assignors heretofore laid down and operated an electric street railway over, along, and upon that portion of Grand Avenue, in the City of Des Moines lying between the west line of West Sixth Street and the east line of East Ninth Street, and the owners of property along said street desire the reconstruction of said railway; now, therefore,

Be it Resolved by the City Council of the City of Des Moines:

That the Des Moines City Railway Company and its assigns, be and they are hereby requested to relay its tracks, with a single or double track, along and upon that portion of said Grand Avenue, above described, and to reconstruct its poles and wires thereon and to operate the same in connection with its other tracks in the City of Des Moines.

Be it further resolved, That the provisions herein mentioned are subject to such reasonable regulations and ordinances of a police nature as the City Council of said City may from time to time deem it necessary to adopt.

To which was attached petition signed Iowa Knitting Company *et al.*, who reside on and are interested in Grand Avenue from East Ninth Street to West Sixth Street, asking that said track be replaced on said street and operated by said Des Moines City Railway Co. Moved by Whitney to adopt resolution.

Motion carried. Yeas; Brereton, Harley, Higgins, Prunty, Smith, Van Dyck, Whitney, (7) nays none; Fraley and King absent.

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1488 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1489 EXHIBIT No. 194. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 4, 1903, Page 143.

No. 229. Communication from the Des Moines City Railway Co. by J. S. Polk, President, presented as follows:

GENTLEMEN: You are hereby notified that the Des Moines City Railway Company, has, this 30th day of April accepted your resolu-

tion, passed the 27th day of April, 1903, requesting us to replace our tracks on that portion of Grand Avenue lying between the west line of Sixth street and the east line of East Ninth Street, and that it has commenced work thereon.

Yours truly,
(Signed) J. S. POLK, *President.*

Moved by Brereton, to receive and file. Motion carried. Yeas; Brereton, Harley, Prunty, Smith, Van Dyck, Whitney, (6) Nays, none, Fraley, Higgins, and King absent.

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1490 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1491 EXHIBIT No. 195. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 28, 1903, Page 231.

No. 438. Communication from Board of Public Works and City Engineer presented as follows:—

GENTLEMEN: We have examined the brick pavement on Grand Avenue between West Sixth avenue and East Ninth Street, and beg leave to report as follows:

From West Sixth avenue to West Second Street we estimate present value $0.36½; one fourth of first cost; pavement laid in month of June 1894.

From West Second street to river, we estimate the present value of $0.48⅜; one third of first cost; pavement laid in the month of June 1897.

From river to East Fifth street, we estimate present value $0.59¾; one-half of first cost; pavement laid in the month of July, 1897.

From East Fifth street to east Ninth street, we estimate present value of $0.43; one fourth of first cost; pavement laid in the month of July, 1894.

Respectfully submitted,

B. O. HANGER,
W. W. WISE,
Board of Public Works.
JOHN W. BUDD,
City Engineer.

Plats attached showing location of said tracks.

Moved by Fraley to adopt report. Motion carried. Yeas, Brereton, Fraley, Harley, Higgins, Prunty, Smith, Van Dyck, Whitney, (8) Nays None, King absent.

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1492 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1493 EXHIBIT No. 196. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 1, 1903, Page 259.

Ordinance No. 1214.

An ordinance to amend ordinance No. 1017, passed November 14, 1899, entitled "An ordinance to regulate, license, and tax house movers, and prescribe rules and regulations governing the moving of houses and buildings upon, along, across or near any street, avenue, highway or alley of the city, and to prescribe penalties for a violation thereof."

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That Section 7 of Ordinance No. 1017, passed November 14, 1899, being Section 701 of the Revised Ordinances of 1900 of the City of Des Moines, be and the same is hereby amended so as to read as follows:

SEC. 7. No permit shall be issued for carrying or transporting any house or other building, over, along, upon or across any street, avenue, highway or alley, within the following described limits, to-wit:

Commencing on the bank of the Des Moines River at the center of Vine street, thence west along the center of Vine street to the west line of Seventh street, thence northerly along the west line of Seventh street to the north line of High street, thence easterly along the north line of High street, and the said north line produced, to a point on the bank of the Des Moines River where the said north line of High street, if produced would intersect the said bank, thence southerly along the right bank of the Des Moines River to the place of beginning.

And all that portion of the City of Des Moines lying east of the Des Moines river within the following described limits, towit:

Commencing at a point on the center line of the alley running east and west between Grand Avenue and Des Moines Street where the west line of Third street, if produced northerly would in-
1494 tersect the said center line of said alley, thence running easterly along the center of said alley to a point where the east line of Seventh street if produced northerly would intersect the said center line, thence southerly along the east line of Seventh street produced and the east line of Seventh Street to the center of Block "G" of Griffith's Addition to the City of Des Moines, thence westerly along the center line of Block "F" "C," and "B" of Griffith's Addition produced, to the center of Fourth street, thence southerly along the center of Fourth street to the center of the south alley running east and west between Walnut street and Court avenue,

thence westerly along the center of said alley to the west line of Third street, thence northerly along the said west line produced, to the place of beginning.

It shall be unlawful for any person, firm or corporation, to move any house or building upon, along across or over any street, avenue, highway, alley, or sidewalk within the above described limits. No permit shall be issued to carry or transport any house or other building over, along, across or upon any street, avenue, highway, alley or sidewalk outside the above described limits, if such carrying or transporting shall render necessary the cutting or injury of any trolley wire or any telephone or electric cable, including street railway feed cables, maintained at an elevation of thirty feet.

No permit shall be issued for carrying or transporting any house or other building, over or across any bridge, nor for moving or carrying any brick or stone house a distance of more than three hundred feet upon, along, or over any paved street, nor for carrying any building upon, along, or across any street railway track, during the hours when the cars run, except upon the written consent of the company owning such track, which consent must be filed with the application. Nor for the removal or carr-ing of any building upon, along or over any street which shall be unsafe, or 1495 & 1496 which will occasion permanent injury to the pavements, or electric poles, or wires, or which will unreasonably obstruct any street or public way, or injure private property. Nor shall any permit be issued except for work to be done by a person, firm or corporation duly licensed as in this ordinance provided.

SEC. 2. That Section 11, or Ordinance No. 1017, passed November 14, 1899, being Section 705 of the Revised Ordinances of 1900, of the City of Des Moines, be and the same is hereby amended so as to read as follows:

SEC. 11. If any person, firm or corporation shall in any application for a permit filed under the provisions of Section 6 of this ordinance make any untrue or false statements, the license of such person, firm or corporation to engage in the business of house moving in this city, shall be revoked by the City Treasurer.

Any person, firm or corporation, who shall engage in the business hereinbefore described without first procuring a license therefor, or who shall move, raise, or lawoer any house or building, without procuring a permit therefor, when a permit is required, or shall otherwise violate the provisions of this ordinance, shall, upon conviction thereof, be fined not less than $10 nor more than $100.

SEC. 3. All ordinances and parts of ordinances inconsistnet herewith are hereby repealed.

SEC. 4. This ordinance shall be in full force and effect from and after its passage and publication as provided by law.

Passed May 28, 1903.

Approved June 4, 1903.

J. M. BRENTON, *Mayor.*

Attest:

E. R. BENNETT, *City Clerk.*

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above and foregoing ordinance No. 1214 was passed by the City Council of the City of Des Moines at a meeting held May 28, 1903, and approved by the Mayor, June 4, 1903.

E. R. BENNETT, *City Clerk.*

Published as provided by law, June 26, 1903.

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1497 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1498 EXHIBIT No. 197. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 8, 1903, Page 273.

No. 523. An ordinance entitled "An Ordinance amending ordinance No. 711, passed February 4, 1895, and entitled "An ordinance authorizing the Des Moines City Railway Company to use its railways, tracks and cars for carrying the United States Mail, express and freight and for carrying material for the construction and operation of its roads," by repealing Section- 2, 3, and 4 thereof, and enacting substitutes for said repealing sections; and providing for the operation of Interurban Cars over the tracks of the said Des Moines City Railway Company" presented, and received its first reading. Moved by Van Dyck that rules requiring ordinance be read on three different days be dispensed with, and ordinance be put upon its passage. Motion carried. Yeas, Brereton, Fraley, Harley, Higgins, King, Prunty, Smith Van Dyck, Whitney, (9) nays none.

No. 524. Moved by Van Dyck that ordinance be adopted. Motion carried. Yeas Brereton, Fraley, Harley, Higgins, King, Prunty, Smith, Van Dyck Whitney, (9) nays, none, and said ordinance was declared duly adopted.

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1499 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1500 EXHIBIT No. 198. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 1216.

An ordinance amending ordinance No. 711, passed February 4th, 1895, and entitled, "An ordinance authorizing the Des Moines City Railway Company to use its railways, tracks and cars for carrying the United States Mail, express and freight, and for carrying material for the construction and operation of its roads," by repealing sections two (2), three (3) and four (4) thereof, and enacting substitutes for said repealed sections; providing for the operation of interurban cars over the tracks of said Des Moines City Railway Company.

Whereas, The Des Moines City Railway Company now maintains and operates certain tracks over which it is entitled among other things to haul freight, including the track from Walnut street to Locust street on West Front or Water street; and

Whereas, It is desired, on account of the location of the City Library building; and,

Whereas, The said Des Moines City Railway Company has agreed to remove its track from West Front or Water street between Walnut and Locust streets, and to relinquish its rights in that portion of said West Front or Water street which lies between Walnut and Locust streets said agreement, however, being upon express condition that this ordinance be first legally enacted and approved so as to vest in said Des Moines City Railway Company the rights granted by this ordinance before any relinquishment by said company of any of its rights in said portion of said Front or Water street.

Be it ordained by the city council of the city of Des Moines:

SECTION 1. That sections two (2) three (3) and four (4) of said Ordinance No. 711, passed February 4th, 1893, entitled "An Ordinance authorizing the Des Moines City Railway Company to use its railways, tracks and cars for carrying the United States mail, express and freight, and for carrying material for the construction and operation of its roads," be and the same are hereby repealed.

1501 SEC. 2. That there be enacted in lieu of said section two (2) of said Ordinance No. 711, passed February 4th, 1895, the following:

The said company is further authorized to carry freights over the following lines of its roads, to-wit:

Its belt line, and river line, and Sevastopol line, and the connection of said lines, which connection shall be made by extending its line from the Sevastopol line north along the east side of West Front or Water street to the north line of Walnut street, and westerly from its line on Front along Court avenue to West Second street, thence northerly along West Second street to Commerical street,

thence easterly along Commerical street to where it intersects said belt line and river line railway at or near the dam across the Des Moines River.

And it is further authorized to haul freight over and along such extensions of its said belt line as may be made to various industries now or hereafter situated in the north portion of the city, including the Iowa Brick Company's plant and the Flint Brick Company's plant, and also over and along such extensions as may be made from said Sevastopol line. Said company may run switches from said line on West Front street and Water street west into the several alleys running west therefrom, and haul freight over the same, provided said switches shall not run further west along such alleys than West Second street, and said switches shall be laid with the consent of the parties owning property abutting on that portion of said alleys in which said switches may be laid. They may also lay down and operate switches from the line contemplated on west Second street into the alleys on the east side of Second Street, and haul freight over the same, with the consent of the persons owning property abutting on that portion of said alleys in which said switches may be laid.

SEC. 3. That there be enacted in lieu of section three (3) of said ordinance No. 711, passed February 4th, 1895, the following:

1502 Said company shall also have the power to haul freight over and along the lines of its roads running from said connecting lines to its power house, which lines run along Grand Avenue to East Second street, thence north on East Second Street to Maple Street, thence east on Maple street to East fourth street, thence north on East Fourth street to its said power house. It may also run switches from the same through the alleys crossing the same, provided persons owning property abutting on that portion of said alleys which shall be occupied by said switches shall consent thereto, and it may also connect with the several railways crossing its railway.

And it is further provided that the trains hauling freight along the said lines shall not consist of more than one motor car and two other cars, unless the council shall by resolution hereafter authorize longer trains to be hauled over said lines.

SEC. 4. That there be enacted in lieu of section four (4) of said ordinance No. 711, passed February 4th, 1895, the following:

The said company shall annually, on or before the 15th day of December of each year, furnish to the City Treasurer, a statement of the gross receipts of the company arising from the carrying of mail, express matter and f-eight for the year ending the first day of December of that year, which statement shall be subscribed and sworn to by the Secretary and treasurer of the said City Railway Co. and as a consideration for the privileges herein granted, the said company from the date of the acceptance of this ordinance, shall pay into the treasury of the City of Des Moines a sum equal to five per cent. of such gross receipts, said payment to be made by the said Co. on or before the first day of January immediately following the making of the report above required.

SEC. 5. That this ordinance shall not restrict the operation of passenger cars of interurban railway companies over the tracks of

said Des Moines City Railway Company, or the transportation over said tracks of such parcels, packages, baggage, mail
1503 & 1504 and express as may be carried in passenger or combination baggage cars of interurban railway companies; and the Des Moines City Railway Company shall be, and is hereby expressly authorized, to operate, or to permit others to operate, over its tracks, including those tracks not along or in the streets described in this ordinance, as well as those in the streets herein described, the cars of any interurban railway company for transporting passengers, mail, baggage and such parcels, packages, and freight, as it may carry in its passenger or combination cars only.

SEC. 6. This ordinance shall operate as a contract between the City of Des Moines and the said Des Moines City Railway Company its lessees, successors, and assigns, upon the grants herein made being accepted in writing by the said railway company within thirty days after the passage of this ordinance, and upon the payment by said railway company of the cost of publication hereof.

SEC. 7. The Des Moines City Railway Company agrees to remove that portion of the track between Court Avenue and Walnut street on West Water street or Front street in the event the city and the United States government desires the removal of said tracks.

Passed June 8, 1903.

Approved July 11, 1903.

J. M. BRENTON, *Mayor.*

Attest:

E. R. BENNETT,
City Clerk.

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above ordinance No. 1216 was passed by the City Council of the City of Des Moines at a meeting held June 8, 1903, and approved by the Mayor June 11, 1903.

E. R. BENNETT,
City Clerk.

Published in Des Moines Daily News June 12, 1903.

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1505 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1506 EXHIBIT No. 199. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 15, 1903, Page 294.

No. 561.

Resolution by Fraley.

Be it resolved by the City Council of the City of Des Moines:
That the Board of Public Works be and is hereby instructed to notify the Des Moines City Railway Company to pave that portion of East Walnut Street from the east line of Eleventh street to the west line of Eighteenth street lying between the rails of its tracks and one foot outside thereof, at the same time and of the same material as provided in the contract between the City of Des Moines and the Barber Paving Company for paving said street; said notice to be additional to the notice provided for by the Ordinances of the City of Des Moines.

Moved by Fraley to adopt. Substitute motion by Van Dyck to defer action two weeks. Substitute motion carried. Yeas; Brereton, Harley, King, Prunty, Smith, Van Dyck, (6) nays, Fraley, Higgins, Whitney (3).

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1507 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1508 EXHIBIT No. 200. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 15, 1903, Page 295.

No. 562.

Resolution by Fraley.

Be it Resolved by the City Council of the City of Des Moines:
That the Board of Public Works be and is hereby instructed to notify the Des Moines City Railway Company to pave that portion of East Twelfth Street from the north line of Grand Avenue to the south line of Washington Avenue, lying between the rails of its tracks and one foot outside thereof, at the same time and of the same material as provided in the contract between the City of Des Moines and the Barber Asphalt Paving Company for paving said street;

said notice to be additional to the notice provided for by the Ordinances of the City of Des Moines.

Moved by Higgins to adopt. Substitute motion by Van Dyck to defer action two weeks. Substitute motion lost. Yeas, Brereton, King, Smith, Van Dyck, (4) Nays, Fraley, Harley, Higgins, Prunty, Whitney, (5).

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1509 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1510 EXHIBIT No. 201. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Aug-st 3, 1903, Page 432.

No. 854.

Resolution by Fraley.

Be it Resolved by the City Council of the City of Des Moines:

That the Board of Public Works be and is hereby instructed to notify the Des Moines City Railway Company to pave that portion of East Walnut street from the east line of Eleventh street to the west line of Eighteenth street lying between the rails of its tracks and one foot outside thereof, at the same time and of the same material as provided in the contract between the City of Des Moines and the Barber Asphalt Paving Company for paving said street, said notice to be additional to the notice provided for by the ordinances of the City of Des Moines.

Moved by Whitney to adopt. Motion carried. Yeas, Fraley, Harley, Higgins, Prunty, Smith, Whitney, (6) nays, Brereton, King, Van Dyck.

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1511 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1512 EXHIBIT No. 202. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 17, 1903, Page 494.

No. 1004. Petition signed by W. York, *et al.* Citizens residing on West Fourth Street between School street and North street petitioning Council to take the necessary steps to secure the extension of

the West Fourth Street line of the Des Moines City Railway from School street to North street, presented.

Moved by Van Dyck to grant request, and Committee on Water Works and Railroads be instructed to notify the Des Moines City Railway Co. Motion carried. Yeas: Brereton, Fraley, Harley, Higgins, Smith, Van Dyck, Whitney, (7) Nays None; Prunty not voting; King absent.

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1513 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1514 EXHIBIT No. 203. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Sept. 8, 1903, Page 542.

No. 1113. Petition signed by W. W. Townsend, *et al.* Citizens and patrons of the Des Moines City Railway Co., living on and near Eleventh, Twelfth and Clark street car lines, asking that Council compel said company to give better and more frequent service on said lines, and asking for a ten minutes' service both way, presented, and on motion of Fraley, referred to Committee on Water Works and Railroads and Solicitor.

(Whitney entered and took his seat.)

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1515 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1516 & 1517 EXHIBIT No. 204. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Sept. 8, 1903, Page 551.

Ordinance No. 1232.

An ordinance to prevent accidents at the street car waiting room.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That it shall be unlawful to move any automobile, bicycle or other vehicle, or any animal at greater speed than four miles an hour on West Sixth avenue between Walnut street and Mulberry street, and on Mulberry street between Sixth avenue and Seventh street.

SEC. 2. The penalty for a violation of this ordinance shall be a fine of not less than five dollars nor more than one hundred dol-

lars, or imprisonment not less than five days nor more than thirty days.

SEC. 3. This ordinance shall take affect and be in force from and after its publication.

Passed September 8, 1903.

Approved September 10, 1903.

J. M. BRENTON, *Mayor.*

Attest:

E. R. BENNETT, *City Clerk.*

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above ordinance No. 1232, was passed by the City Council at a meeting held September 8, 1903, and approved by the Mayor September 10, 1903.

E. R. BENNETT, *City Clerk.*

Published as provided by law, October 13, 1903.

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1518 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1519 EXHIBIT No. 205. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.

vs.

CITY OF DES MOINES.

Sept. 21, 1903, Page 565.

No. 1169.

Resolution by Smith.

Whereas, The Des Moines City Railway desires to construct a line running from a connection with its present line at West Tenth and Center streets, east along Center Street to Ninth Street, thence south along Ninth street to Park street, thence east on Park street to Seventh street, thence south on seventh street to a connection with its present line on said street; and

Whereas, To construct the said line will involve its laying its tracks in some instances on parallel streets nearer together than two blocks:

Be it and it is hereby resolved:

That the City Council of the City of Des Moines for the said City, hereby consents to the construction, maintenance and operation by the Des Moines City Railway Company of a double or single track street railway along the route hereinbefore described so far as said consent may be necessary in order to authorize the laying of tracks nearer together than two blocks.

Moved by Smith to adopt. Motion carried. Yeas, Brereton, Harley, Higgins, King, Prunty, Smith, Van Dyck, Whitney, (8) nays none; Fraley not voting.

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1520 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1521 EXHIBIT No. 206. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Sept. 24, 1903, Page 586.

Be it resolved by the City Council of the City of Des Moines:

That the City Auditor be and he is hereby instructed to draw warrants in favor of the property owners owning property abutting on Grand Avenue between Sixth avenue and East Ninth street as shown on the schedule on file in the office of the City Engineer, a copy of which is hereto attached, in the amounts shown opposite the names of such property owners, payable out of the City Improvement Fund, for rebate assessment for paving paid by the Des Moines City Railway Company. No warrantes to be drawn in favor of any party who has filed or given to the Des Moines City Railway Company a waiver of his right to such rebate, a copy of which said waivers is now on file in the office of the City Auditor and the City Treasurer. The total amount of said warrants being $3,448.86.

Moved by Higgins to adopt. Motion carried. Yeas, Brereton, Harley, Higgins, King, Prunty, Smith, Van Dyck, Whitney, (8); nays none Praley, Absent.

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1522 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1523 EXHIBIT No. 207. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Sept. 28, 1903, Page 593.

No. 1253. Report of Board of Public Works and City Engineer, presented as follows:

GENTLEMEN: We have examined the brick paving that is to be displaced by the Des Moines City Railway Company in laying their tracks on the following streets, and we beg to report as follows:

On West Seventh street from Grand Avenue to Park street, we estimate the present value at 34¢ or one-fourth of first cost; pavement laid in 1895.

On Park street from Seventh to Ninth, we estimate the present value at 38½¢ or one-fourth of first cost; pavement laid in 1893.

On West Ninth street from Park to Center we estimate the present value at 40¢ or one fourth of first cost; pavement laid in 1892.

On Center street from Ninth to Tenth we estimate the present value at 40½¢ or one-fourth of first cost; pavement laid in 1891.

On Seventeenth street from Center to Crocker, we estimate the present value at 43½¢ or one-fourth of first cost; pavement laid in 1889.

On University Avenue from Seventeenth to Twentieth streets, we estimate the cost at 28¾¢ or one-fourth of first cost; pavement laid in 1895.

On Twentieth street from University avenue to Forest avenue, we estimate the cost at 31¾¢ or one-fourth of first cost; pavement laid in 1895.

On Twentieth street from Forest avenue to St. Joseph street, we estimate the cost at 24¾¢ or one fourth of first cost; pavement laid in 1894.

Respectfully submitted.

B. O. HANGER,
W. W. WISE,
Board of Public Works.
JOHN W. BUDD,
City Engineer.

Moved by Fraley to adopt. Motion carried. Yeas Fraley, Harley, Higgins, King, Prunty, Smith, (6) Nays, none, Whitney not voting Brereton and Van Dyck absent.

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1524 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1525 EXHIBIT No. 208. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Nov. 2, 1903, Page 691.

No. 1456.

Resolution by Prunty.

Be it Resolved by the City Council of the City of Des Moines: That the City Auditor be and he is hereby instructed to draw warrants in favor of the property owners owning property abutting on Seventh between Grand Avenue and Park street, Park street between Seventh and Ninth streets, Ninth street between Park street and Center street, Center street between Ninth street and Tenth street, and Seventeenth street between Center street and Crocker street, as shown on the schedule on file in the office of the City Engineer, a copy of which is hereto attached, in the amounts shown opposite the names of such property owners, payable out of the City Improvement Fund for rebate assessment for paving paid by the Des Moines City Railway Co. No warrants to be drawn in favor of any party who has filed or given to the Des Moines City Railway Co.

a waiver of his right to such rebate, a copy of which said waiver is now on file in the office of the City Auditor and the City Treasurer. The total amount of said warrants being $1,325.79.

Moved by Prunty to adopt. Motion carried. Yeas, Brereton, Fraley, Harley, Higgins, King, Prunty, Smith, Van Dyck, Whitney, (9) nays, none.

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1526 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1527 & 1528 EXHIBIT No. 209. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Nov. 17, 1903, Page 726.

No. 1538.

Resolution by Higgins.

Whereas, a Melan Arch Bridge is now in the process of construction across the Des Moines river on North Sixth avenue in this City; and

Whereas, it is understood that the Des Moines City Railway expects to lay tracks upon said bridge and operate its cars across the same; and

Whereas, if the laying of such tracks and the erection of the necessary poles and wires to operate same is delayed until after said bridge is full- completed, it will be very detrimental to said bridge and will to some extent obstruct public travel across same;

Now, Therefore, Be it and it is Hereby Resolved by the City Council of the City of Des Moines;

SECTION 1. That the said Des Moines City Railway Company shall proceed to lay its tracks and erect the necessary poles and wires to operate same upon and across said bridge before the said bridge is entirely completed, and while it is still in process of construction.

SEC. 2. That the poles used by said company on said bridge shall be of iron and of such form as shall be approved by the Board of Public Works, and all work done by said company on said bridge in laying said tracks and erecting said poles and wires shall be done under the supervidion and direction of the Board of Public Works, and at such times and in such manner as to interfere as little as possible with the work of erecting and completing said bridge.

Moved by Higgins to adopt. Motion carried. Yeas, Brereton, Fraley, Harley, Higgins, King, Prunty, Smith, Van Dyck, Whitney, (9) nays, None.

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1529 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1530 EXHIBIT No. 210. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

March 3, 1904, Page 881.

No. 1866. Report of Board of Public Works and City Engineer, supplemental to the report adopted by the City Council on September 28, 1903, under R. C. No. 1233, to which was attached the following resolution:

Be it Resolved by the City Council of the City of Des Moines:

That the report of the Board of Public Works and City Engineer of said City made September 28, 1903, as to the cost of certain paving upon streets where the Des Moines City Railway Company desired to locate its tracks, and the supplemental report of said Board of Public Works and City Engineer as to the said matter, filed the 3d day of March, 1904, be and the same are hereby in all respects approved.

Resolved further, After reading the said reports, and a full con ideration of the matter, the Council bring fully advised in the premises, that the value of the paving on the following named streets occupied by the tracks of the said Des Moines City Railway Company and referred to in the said reports, be and the same is hereby fixed and determined as follows:

First. That the value of the said paving on West Seventh street from Grand Avenue to Park street, be and the same is hereby fixed and determined at 34¢ per square yard.

Second. That the value of the said paving on Park street from Seventh street to Ninth street be and the same is hereby fixed and determined at 38⅛¢ per square yard.

Third. That the value of the paving on West Ninth street from Park street to Center street be and the same is hereby fixed and determined at 40¢ per square yard.

Fourth. That the value of the said paving on Center street from Ninth street to Tenth street be and the same is hereby fixed and determined at 40½¢ per square yard.

Fifth. That the value of the paving on Seventeenth Street from Center Street to Crocker street be and the same is hereby fixed and determined at 40½¢ per square yard.

Sixth. That the value of the paving on University Avenue from Seventeenth street to Twentieth street be and the same is hereby fixed and determined at 28¾¢ per square yard.

Seventh. That the value of the paving on Twentieth street from University avenue to Forest avenue be and the same is hereby fixed and determined at 31¾¢ per square yard.

Eighth. That the value of the paving on Twentieth street from Forest avenue to St. Joseph street be and the same is hereby fixed and determined at 24¾¢ per square yard.

Moved by Fraley to adopt resolution. Motion carried. Yeas;

Brereton, Fraley, Harley, Smith, Van Dyck, Whitney, (6) nays none, Higgins not voting, King and Prunty absent.

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1531 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1532 EXHIBIT No. 211. J. B. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 26, 1904, Page 126.

No. 502. Report of Board of Public Works and City Engineer presented as follows:

GENTLEMEN: Referring — the application of the Des Moines City Railway Company for the determination of the value of the paving upon West Second street from the first alley south of Locust to Court avenue which — is proposed to occupy with its tracks, which application for the appraisement of this paving was filed with us April 14, 1904, we beg leave to make the following report:

That the paving on West Second Street from Locust to Court avenue was laid in 1894; it is brick upon brick, the original cost of the same was $1.73 per sufer-icial yard, plus ½¢ per square yard for incidentals. The quality of the said pavement is fair and the condition thereof is fair, and we estimate the value of the same at the present time at 52¢ per square yard.

Respectfully submitted,
(Signed) W. W. WISE,
J. W. CAMPBELL,
Board of — Works.
JOHN W. BUDD,
City Engineer.

To which was attached the following resolution by Whitney;

Be it Resolved by the City Council of the City of Des Moines:

That the report of the Board of Public Works and the City Engineer of the said City, made this 26th day of May, 1904, as to the costs of paving upon West Second Street from Locust street to Court Avenue, where the Des Moines City Railway Company desires to locate its tracks, be and the same *are* hereby in all respects, approved.

Resolved further, after reading the said report, and the full consideration of the matter, the Council being full- advised in the premises that the value of the paving on West Second Street that is to be occupied by the tracks of the Des Moines City Rail-
1533 way Company referred to in the said report, be and the same is hereby fixed and determined at 52¢ per square yard.

Moved by Van Dyck that report and resolution be adopted. Motion carried. Yeas. Christy, Fraley, Higgins, Schaub, Suther-

land, Van Dyck, Whitney, (7) nays none; Myerly and Smith not voting.

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1534 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1535 EXHIBIT No. 212. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

June 20, 1904, Page 199.

No. 675. Schedule showing the property on University avenue from Seventeenth to Twentieth streets, and on Twentieth street from University avenue to St. Joseph street, together with the owners thereof, which is entitled to a rebate on the cost of the pavement of said streets because railway tracks have been laid on said streets by the Des Moines City Railway Co. also showing the amount of rebate to which each separate lot or parcel of ground is entitled, and which said schedule was prepared by the City Engineer presented.

Moved by Sutherland that schedule be approved, and Auditor be instructed to draw warrants in favor of the respective property owners shown on said schedule for the respective amounts to which they are entitled, as shown by said schedule, said warrants to be payable out of the fund paid to the City Treasurer by the Des Moines City Railway Company as the value of the paving taken by said Railway Company in laying their tracks. Motion carried. Yeas; Christy, Fraley, Higgins, Myerly, Sutherland, Whitney, (6) nays none; Van Dyck not voting; Schaub and Smith absent.

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1536 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1537 EXHIBIT No. 213. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

July 5, 1904, Page 250.

No. 833. Communication from the Des Moines City Railway Company by J. S. Polk, President, accepting the resolution passed June 20, 1904, in reference to the change in the right of way of the Des Moines City Railway Company on West Seventeenth street from Grand Avenue to Ingersol avenue, presented.

Moved by Myerly to receive and file. Motion carried. Yeas, Christy, Fraley, Higgins, Myerly, Smith, Sutherland, Whitney, (7) nays none; Van Dyck not voting; Schaub absent.

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1538 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1539 EXHIBIT No. 214. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 29, 1904, Page 394.

No. 1257.

Be it Resolved by the City Council of the City of Des Moines:

That the request of the Des Moines City Railway Company consented to by the Barber Asphalt Paving Co. and which has been approved by the Board of Public Works and which has this day been filed with the City Clerk, asking that the pavement on West Thirteenth street from University avenue to Clark street, be in the space between the tracks of the street Railway Company, and one foot outside thereof, composed of one course of vitrified brick on a concrete foundation, be and the same is hereby granted.

Moved by Smith to adopt. Yeas, Christy, Fraley, Schaub, Smith, Whitney, (5) nays none; Higgins, Myerly, Sutherland, and Van Dyck absent.

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1540 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1541 EXHIBIT No. 215. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Aug. 29, 1904, Page 457.

Ordinance No. 1282.

An ordinance to amend ordinance No. 647, the same being chapter 1 of Title XIII of the Revised Ordinance of the City of Des Moines, and entitled "An ordinance to regulate electric wires, and the poles and fixtures therefor, and to prescribe the place where and the manner in which the same shall be erected upon and along the streets and alleys of the City of Des Moines."

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That Section 2 of Ordinance No. 647, the same being chapter 1 of Title XIII of the revised Ordinances of the City of Des Moines, and entitled "An Ordinance to regulate electric wires, and prescribe the place where and the manner in which the same shall be erected upon and along the streets and alleys of the City of Des

Moines," be and the same is hereby repealed, and the following enacted in lieu thereof:

SECTION 2. That poles carrying electric wires upon and along the streets shall not be placed less than one hundred and twenty feet apart on the same side of the street, except that poles carrying the wires of electric street railways may be placed not less than one hundred feet apart on the same side of the street, and where placed on both sides of the street shall be opposite each other; and, as far as possible, wires carrying heavy electric currents shall be placed on one side of the street, and those carrying light currents shall be placed on the other side of the street. No such pole shall be placed opposite the entra-ce of any building, nor so as to unnecessarily obstruct the travel upon the streets, nor unnecessarily interfere with the use of areas and vaults and other structures in the streets. Said poles shall be placed on the inside of sidewalk side of the curb, but shall not extend into any sidewalk more than twelve inches from the inside of the curb, and any excess in the thickness of the pol*e* shall extend into or through the curb. Provided,
1542 that all wires placed on all such poles, except the wires of electric street railways, shall not be less than thirty feet, within the fire limits, from the surface of the ground.

SECTION 3. This ordinance shall be in full force and effect from and after its passage and publication according to law.

Passed September 19, 1904.

Approved September 20, 1904.

G. W. MATTERN, *Mayor.*

Attest:

N. B. VERTREES, *City Clerk.*

Published in Register and Leader September 21, 1904.

I, N. B. Vertrees, City Clerk of the City of Des Moines, hereby certify that the foregoing ordinance No. 1282 was passed by the City Council of Des Moines September 19, 1904, approved by the Mayor, Sept. 20, 1904, and published as provided by law in the Register and Leader, Sept. 21, 1904.

N. B. VERTREES, *City Clerk.*

Published as provided by law, October 5, 1904.

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1543 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1544 EXHIBIT No. 216. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

March 30, 1905, Page 815.

No. 2604. Petition signed by the Des Moines Improvement Association asking Council to direct the Des Moines Street Railway Com-

pany to confine their tracks on Main Street through Central Place to their right of way on said street, and to conform with the condition for operating cars over said line by lowering their tracks to grade at cross streets, presented and on motion referred to Streets and Alleys Committee.

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1545 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1546 EXHIBIT No. 217. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 1, 1905, Page 82.

No. 225. Petition signed by Henry Tollinson, *et al.*, residents and owners of property on Jefferson and Franklin Streets, in Rollinson's addition, stating that the only ingress and egress to said properties is by way of Bluff street, and that the Des Moines City Railway Company, or the Interurban Railway Company have commenced to lay an additional track on Bluff Street from Washington street north to the river, and that they are laying the track so close to the east side of the street and also placing poles along side of said street, so that it does not leave room for vehicles to pass along said street, and if the same is allowed to be built and maintained, it will be a great damage to their properties, and protesting against the obstructions, and that immediate action be taken to prevent the said companies from so occupying said street and maintaining the same so as to obstruct the free use of said street as a public highway, presented, and on motion referred to the Board of Public Works, with instructions to have the Street Railway Company give room for teams between track and poles. Yeas: Fraley, Higgins, Myerly, Smith, Van Dyck, Whitney, (6) nays, none, Christy and Sutherland not voting, Schaub absent.

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1547 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1548 EXHIBIT No. 218. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 1, 1905, Page 96.

No. 287.

Be it resolved by the City Council of the City of Des Moines That the Des Moines Street Railway Company be granted the privilege of

placing Madison Square avenue to a practicable grade between Fountain Avenue and Summit Street.

Moved by Fraley to adopt. Motion carried. Yeas; Christy, Fraley, Higgins, Myerly, Smith, Sutherland, Van Dyck, Whitney, (8), nays, none; Schaub absent.

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1549 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1550 EXHIBIT No. 219. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

May 15, 1905, Page 127.

No. 394. Report of the Board of Public Works and City Engineer on the application of the Des Moines City Railway Company for a determination of the value of the paving upon certain streets already paved which it purposes to occupy with a second track, and which application was filed with the Board on April 25, 1905, presented to which was attached the following resolution:

Be it resolved by the City Council of the City of Des Moines:

That the report of the Board of Public Works and City Engineer of said City dated the 15th day of May, 1905, as to the cost of certain paving upon streets where the Des Moines City Railway Company desire to locate its tracks be and the same are hereby in all respects approved.

Resolved Further: After reading the said reports and a full consideration of the matter, the Council being fully advised in the premises, that the value of the paving on the following named streets, occupied by the tracks of the said Des Moines City Railway Company and referred to in the said report be and the same is hereby fixed and determined as follows:

1st. The value of the said paving on University Avenue from West Twenty Fourth to West Twenty ninth street be and the same is hereby fixed and determined at 84 cents per square yard.

Second. That the value of the said paving on West Grand Avenue from Twelfth to Fourteenth street be and the same is hereby fixed and determined at 83 cents per square yard.

Third. That the value of the paving on West Ninth street from Forest Avenue to State street be and the same is hereby fixed and determined at 94½ cents per square yard.

1551 Fourth. That the value of the paving on Sixth Avenue from North street to 275 feet north of Forest Avenue be and the same is hereby fixed and determined at 90 cents per square yard.

Fifth. That the value of the paving on Sixth Avenue three hundred and seventy-five feet north of Forest Avenue to Clark, be and the same is hereby affixed and determined at $1.01 per square yard.

Sixth. The value of the paving on East Ninth street from Filmore

to Hubbell be and the same is hereby fixed and determined at 77¢ per square yard.

Moved by Whitney to adopt. Motion carried. Yeas; Christy, Fraley, Higgins, Schaub, Smith, Sutherland, Van Dyck, Whitney, (8) nays None, Myerly not voting.

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1552 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1553 EXHIBIT No. 220. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

March 20, 1905, Page 787.

No. 2502.

Be it resolved by the City Council of the City of Des Moines: That the Board of Public Works be and it is hereby instructed to notify the Des Moines City Railway Company to remove its tracks from West First Street or Front street between Locust Street and Court Avenue, within five days from service of the notice, and upon its failure to do so, the Board of Public Works is hereby instructed to cause said First or Front Street to be brought to a proper grade and fill to be made on top of said tracks.

Moved by Sutherland to adopt. Motion carried. Yeas; Christy, Fraley, Higgins, Myerly, Schaub, Smith, Sutherland, Whitney, (8) nays none, Van Dyck, not voting.

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1554 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1555 EXHIBIT No. 221. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 7, 1905, Page 321.

No. 1082. Report of Board of Public Works on 758, resolution instructing Auditor to pay balance of schedule for rebates on paving on West Grand Avenue between Twelfth and Fourteenth Streets (where the Des Moines City Railway Company put in double tracks) said balance being $26.88 due Dora M. Stewart, Trustee, reporting that the above amount is correct, and recommending payment of the same, presented, and on motion referred to City Solicitor.

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1556 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1557 EXHIBIT No. 222. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 12, 1905, Page 353.

No. 1168.

Be it Resolved by the City Council of the City of Des Moines:

That pursuant to the recommendation of the Board of Public Works and City Engineer the said Board and Engineer are hereby instructed to change the requirements for filling brick along the street railway tracks on Walnut Street between the west line of Second Street and the east line of Ninth street from hot sand and asphaltic cement to dry screened sand.

Moved by Sutherland to adopt. Motion carried. Yeas: Christy, Fraley, Higgins, Myerly, Schaub, Smith, Sutherland, Van Dyck and Whitney, (9); nays, none.

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1558 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1559 & 1560 EXHIBIT No. 223. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

August 24, 1905, Page 375.

No. 1233. Proposed resolution of necessity presented as follows: Petition signed by the Savery House Hotel Co., *et al.*, owners of property on said street, petitioning for said improvement, attached:

Be it Resolved by the City Council of the City of Des Moines:

That it is deemed advisable and necessary to make improvements by laying a sheet asphalt pavement upon three inches of Portland cement concrete foundation constructed upon existing concrete foundation where such concrete foundation now exists, and upon six inches Portland cement concrete foundation where no concrete foundation now exists, one inch asphalt binder course and two inches asphalt wearing surface, on the following named streets and parts of streets, to-wit:

West Fourth Street from the South line of Grand Avenue to the north line of Vine Street.

All of said improvements to be made in accordance with plans and specifications furnished by the City Engineer and approved by the Board of Public Works of Des Moines, Iowa.

The cost of such improvement to be assessed against the property abutting thereon and the railways and street railway companies whose tracks are located thereon, in accordance with the law governing the same. And the contractor who shall make said improvement shall keep the same in repair for seven years from date of its acceptance by the City.

Be it Further Resolved: That the City Council will meet at 9 o'clock A. M., on the 18th day of September, 1905, at the Council Room in the City Hall for the purpose of considering objections to said proposed resolution and that notice of said proposed resolution and of the passage of this resolution be published as provided by law.

Moved by Whitney to adopt resolution fixing date for consideration of same. Motion carried: Yeas: Fraley, Myerly, Schaub, Sutherland, Whitney, (6); nays none; Christy, Higgins and Van Dyck absent.

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1561 (Endorsed:) Filed Sep. 15, 1905. E. R. Mason, Clerk.

1562–1582 Exhibit #224 is
The Revised Ordinances of Des Moines—1900.
(See side page 1805.)

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1583 EXHIBIT No. 226. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

To the Des Moines City Railway Company:

Whereas: Pursuant to the authority conferred upon it by law, the City Council of the City of Des Moines did on the 26th day of October 1903, and the 21st day of September 1903 pass resolutions #1390 #1391 #1392 #1163 #1164 #1165 copies of said resolutions are hereto attached and made a part of this notice, ordering the Board of Public Works of the City of Des Moines to advertise for bids and enter into a contract for paving with asphalt West 12th St. from the north curb line of School St. to the south curb line of University Avenue. Thirteenth Street from the north curb line of University Avenue to the south line of North Washington Street, except the intersections of intervening east and west streets which are now paved; Harrison Avenue from the west line of 13th St. to the east line of 14th St.; South Washington Street from the west line of 13th Street to the east line of 16th Street, on which streets or portions thereof, the Des Moines City Railway Company has laid tracks, with asphalt of the kind and in the manner set forth in said resolutions, and

Whereas: The said Board of Public Works after complying with the formalities required by law did enter into contract with the

Barber Asphalt Paving Company for paving said streets and parts of said streets with Trinidad Pitch Lake Asphalt in the manner set forth in said resolutions, which contract was duly approved by the City Council of the City of Des Moines.

You are hereby notified to improve that portion of said streets hereinbefore mentioned as lies between the rails of the street railway tracks situated thereon and one foot outside thereof as required by the laws of Iowa and the ordinance of the City of Des Moines, by paving; said paving to be done with Trinidad Pitch Lake Asphalt in the manner set forth in resolutions hereto attached and
1584 made a part of this notice, and in accordance with the specifications on file in the office of the City Engineer and Board of Public Works of the City of Des Moines, the work of paving said portion of said streets to be done at the time the other portion of said street is paved under the contract with the City of Des Moines and the Barber Asphalt Paving Company.

The City of Des Moines by this notice in no way admits that the notice provided for by ordinance No. 953 passed March 6th 1899 is insufficient, but intends this notice to be cumulative and additional to the notice therein provided.

W. W. WISE,
J. W. CAMPBELL,
Board of Public Works.

Service of the foregoing notice is hereby accepted and receipt of copy of same is acknowledged on this — July 1904.

DES MOINES CITY RAILWAY COMPANY,
By —— ——, *President.*
DES MOINES CITY RAILWAY COMPANY,
By —— ——, *General Manager.*

I hereby certify that I served the within notice on J. S. Polk by delivering to him a copy of the same, he waiving the reading thereof in his office in the City of Des Moines this 6th day of July 1904.

R. J. McKEE.

Copy.

1583 No. 1163. Resolution of necessity proposed at a meeting of the Council August 17, 1903, this date, September 21, 1903, set for consideration, against which no protests were filed, presented as follows:

Whereas, the owners of the majority of the linear front feet of the property abutting upon Thirteenth Street from the north curb line of University Avenue to the south line of North Washington Street; Harrison Avenue from the west line of Thirteenth Street to the east line of Fourteenth Street; south Washington Street from the west line of Thirteenth Street to the east line of Sixteenth Street, have petitioned this Council to improve the same by paving the same; and

Whereas, A majority of the signers of said petition have indicated their preference for an asphalt pavement on said streets; therefore

Be it Resolved by the City Council of the City of Des Moines:

That it is deemed advisable and necessary to make improvements by laying an asphalt pavement upon five inches of hydraulic cement concrete, one inch asphalt binder course and one and one-half inches asphalt wearing surface, on the following named streets and parts of streets, to-wit:

Thirteenth Street from the north curb line of University Avenue to the south line of North Washington Street, except the intersections of intervening east and west streets which are now paved; Harrison Avenue from the west line of Thirteenth Street to the east line of Fourteenth Street; South Washington Street from the west line of Thirteenth Street to the east line of Sixteenth Street.

1586 The asphalt to be used of the best quality of "refined" asphalt taken from the Pitch Lake in the Island of Trinidad, or Bermudez Pitch Lake asphalt, all in accordance with specifications furnished by the City Engineer and approved by the Board of Public Works of Des Moines, Iowa.

The special assessment for making such improvement to be made in proportion to the special benefits conferred upon the property and against the railway and street railway companies whose tracks are located thereon, in accordance with the law governing the same.

The contractor who shall be awarded the contract for making said improvement shall, at the time of the execution of the contract by the proper parties, execute a bond with an approved surety company as surety in the sum of fifty per cent. (50%) of the entire cost of the improvement, payable to the City of Des Moines, conditioned upon the faithful performance of the following guarantee:

That the material and workmanship employed in or upon the work shall be of such character that the pavement shall endure without the need of repairs during a period of seven years from and after the completion thereof; that the contractor guarantee the pavement for that period, and in case of any depression greater than three-eighths (⅜) of one inch within the length of a four foot straight edge occurs, or any sign of disintegration appears, or any defects occur within said period except such as are without the fault of the contractor caused by reason of excavations in the pavement, and except such defects as arise from causes not incident to the ordinary wear of street pavements, then the contractor will, within ten days from the time of being notified of such defect, make the same good, or will pay to the City of Des Moines the reasonable cost of remedying such defect.

And the contractor who shall make said improvement shall agree to make all repairs necessary by reason of excavations in the pavement, or any other cause not the fault of the contractor, upon

1587 ten days' written notice from the Board of Public Works or the City Engineer, at a cost not greater than the original cost of the improvement per square yard plus ten per cent. (10%), the City of Des Moines guaranteeing the payment for such repairs.

It being the intention that the contractor shall guarantee that the improvements herein ordered shall be and remain (except as to the defects as may appear or repairs which may be needed by reason of excavations or disturbances of the street not caused by said contractor, his agents, servants or employees) at the end of seven years from the completion thereof in as good condition in all respects as

when completed and as required by the contract and specifications embodied in said contract; and shall be and remain a good, substantial, reliable and durable pavement in material and workmanship as a whole and in all its parts except ordinary wear.

That the contractor shall by the terms of the contract made in pursuance of the terms of this resolution be required to accept and receive the proceeds of the assessment certificates in full of the cost of said improvements without recourse upon the City of Des Moines in any event whatever.

Moved by Smith to adopt. Motion carried. Yeas: Fraley, Harley, Higgins, Prunty, Smith, Whitney, (6); nays: Brecrton, King, Van Dyck, (3). No. 1164.

Be it Resolved by the City Council of the City of Des Moines:

That pursuant to a resolution of necessity proposed at a meeting of this Council, August 17, 1903, and duly passed upon petition of property owners representing a majority of the total number of front feet abutting upon said streets, this *and* date, September 21, 1903, the Board of Public Works is hereby directed to advertise for proposals and enter into contract for improving in the manner specified in the said resolution of necessity as passed, by laying an asphalt pavement upon five inches of hydraulic cement concrete, one inch asphalt binder course, and one and one-half
1588 inches asphalt wearing surface, on the following named streets and parts of streets, to-wit:

Thirteenth Street from the north curb line of University Avenue to the south line of North Washington Street, except the intersection of intervening east and west streets which are now paved; Harrison Avenue from the west line of Thirteenth Street to the east line of Fourteenth Street; South Washington Street from the west line of Thirteenth Street to the east line of Sixteenth Street.

The asphalt to be used to be of the best quality of "refined" asphalt, taken from the Pitch Lake in the Island of Trinidad, or Bermudez Pitch Lake asphalt, all in accordance with specifications furnished by the City Engineer and approved by the Board of Public Works of Des Moines, Iowa.

The cost of making such improvement to be assessed against the property abutting thereon and against the railway and street railway companies whose tracks are located thereon, in accordance with the law governing the same.

Moved by Smith to adopt. Substitute motion by Brereton to amend by inserting after the word "Asphalt" in the Twentieth line of said resolution the words "or any other asphalt equally as good." Substitute motion lost. Yeas: Brereton, King, Van Dyck, (3); Fraley, Harley, Higgins, Prunty, Smith, Whitney, (6).

No. 1165. Vote was then taken on Smith's original motion to adopt resolution, resulting in yeas: Fraley, Harley, Higgins, Prunty, Smith, Whitney, (6); nays: Brereton, King, Van Dyck, (3); and said resolution was declared duly adopted.

1589 No. 394. Report of Board of Public Works and City Engineer on the application of the Des Moines City Railway Co. for a determination of the value of the paving upon certain streets already paved which it proposes to occupy with a second track, and which application was filed with the Board on April 25, 1905, presented, to which was attached the following resolution:

Be it Resolved by the City Council of the City of Des Moines:

That the report of the Board of Public Works and City Engineer of said City dated the 15th day of May, 1905, as to the cost of certain paving upon streets where the Des Moines City Railway Company desire to locate its tracks be and the same are hereby in all respects approved.

Resolved Further, After reading the said reports and a full consideration of the matter, the Council being fully advised in the premises, that the value of the paving on the following named streets occupied by the tracks of the said Des Moines City Railway Company and referred to in the said report be and the same is hereby fixed and determined as follows:

First. The value of the said paving on University Avenue from West Twenty-fourth to West Twenty-ninth Street be and the same is hereby fixed and determined at 84 cents per square yard.

Second. That the value of the said paving on West Grand Avenue from Twelfth to Fourteenth Street be and the same is hereby fixed and determined at 83 cents per square yard.

Third. That the value of the paving on West Ninth Street from Forest Avenue to State Street be and the same is hereby fixed and Determined at 94½ cents per square yard.

Fourth. That the value of the paving on Sixth Avenue from North Street to 275 feet north of Forest Avenue be and the same is hereby fixed and determined at 90 cents per square yard.

Fifth. That the value of the paving on Sixth Avenue three
1590 hundred and seventy-five feet north of Forest Avenue to Clark, be and the same is hereby fixed and determined at $1.01 per square yard.

Sixth. The value of the paving on East Ninth Street from Filmore to Hubbell be and the same is hereby fixed and determined at 77 cents per square yard.

Moved by Whitney to adopt. Motion carried. Yeas: Christy, Fraley, Higgins, Schaub, Smith, Southerland, Van Dyck, Whitney (8); nays none; Myerly not voting.

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1591 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1592 EXHIBIT No. 228. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

Ordinance No. 1129.

An ordinance establishing the grade of Clark Street from Twenty-seventh Street to Thirtieth Street.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That the grade of Clark street from Twenty-seventh street to Thirtieth street be and it is hereby established above City datum as follows, to-wit:

At Twenty-seventh street, north curb, 155.00 feet
At Twenty-seventh street, south curb, 155.50 feet,
At a point 300 feet west of Twenty Seventh Street, 159.25 ft.
At Thirtieth street, 177.50 feet.

SECTION 2. This ordinance shall take effect and be in force from and after its passage and publication as provided by law, and shall not be changed without the consent of the abutting property owners and the Des Moines City Railway Company.

Passed, June 27, 1901.
Approved, June 28, 1901.

J. J. HARTENBOWER, *Mayor.*

Attest:
E. R. BENNETT,
City Clerk.

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above ordinance, No. 1129, was passed by the City Council at a meeting held June 27, 1901, and approved by the Mayor June 28, 1901.

E. R. BENNETT,
City Clerk.

Published as provided by law, July 6, 1901.

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1593 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1594 EXHIBIT No. 229. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the District Court of Iowa in and for Polk County.

No. 1677. Law.

CITY OF DES MOINES
vs.
DES MOINES ST. R. R. CO.

This cause is this day dismissed at Plaintiff's costs as per resolution of the City Council which resolution, it is agreed shall be considered as the stipulation upon which this case shall be dismissed.

It is therefore ordered and adjudged by the Court that the Plaintiff, the City of Des Moines, pay the costs herein taxed at —— Dollars, and that execution issue therefor.

Signed at the end of Proceedings of October 1st, 1889.

MARCUS KAVANAGH, JR., *Judge.*

* * * * * * *

1595 (Endorsed:) Filed Sep. 15, 1906. E. R. Mason, Clerk.

1596 EXHIBIT No. 230. J. P. Blaise, Examiner.

DES MOINES CITY RY. CO.
vs.
CITY OF DES MOINES.

In the District Court of Iowa in and for Polk County.

No. 1375. I.

DES MOINES STREET RAILWAY CO.
vs.
DES MOINES BROAD GUAGE STREET RY. CO.

This cause is this day dismissed at Plaintiff's costs.

It is therefore ordered adjudged by the Court that the Plaintiff, The Des Moines Street Railway Company, pay the costs herein taxed at —— Dollars, and that execution issue therefor.

Signed at the end of the proceedings of October 1, 1889.

MARCUS KAVANAGH, JR., *Judge.*

(District Court Journal No. 33, Page 623.)

1597–1599 (Endorsed:) Filed Sep 15, 1906. E. R. Mason, Clerk.

1600 VOLUME V. EDWARD R. MASON, CLERK.

The Respondent to maintain the issues upon its part introduced and read in evidence Depositions and Exhibits which Depositions and Exhibits were in words and figures as follows, to-wit:

1601 And thereafter to-wit, Sept. 17 1906, there was filed in said Clerk's office in said cause, respondent's testimony, which is in words and figures as follows, to-wit:

1602–1639 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

2437. Equity.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Respondent's Testimony.

Testimony taken in behalf of the respondent, in accordance with the attached stipulation, at the office of Baily & Stipp, Youngerman Building, Des Moines, Iowa, commencing at 9:30 o'clock a. m., September 6, 1906, before J. I. Blaise, examiner.

Appearances: Geo. H. Carr, W. L. Read and N. T. Guernsey, Appearing for Complainant. William H. Bremner, W. H. Baily, and Howard J. Clark, Appearing for Respondent.

(Endorsed:) Filed Sept. 17, 1906, E R. Mason, Clerk.

1640 WILLIAM H. BREMNER, of lawful age, being duly sworn, on the part of Respondent, examined by W. H. BAILY, Esq., testified as follows:

Int. 1. You are the City Solicitor of the City of Des Moines?
Answer. Yes, sir.
Int. 2. And were during the year 1905?
Answer. Yes, sir.
Int. 3. State whether or not the Des Moines City Railway Company served upon you its abstract of record, in the case pending in the Supreme Court, entitled, The State of Iowa upon relation of Robert Fullerton, and others, *vs.* Des Moines City Railway Company and City of Des Moines?
Answer. It did.
Int. 4. State whether the pamphlet marked "Respondent's Exhibit A" is one of the copies of that abstract which was served upon you?
Answer. Yes, it is one of the copies.

Respondent now offers in evidence "Respondent's Exhibit A."
Objected to on the part of Complainant as being irrelevant, immaterial and has no bearing upon the issues involved in this controversy.

Respondent produces a certified copy of the Journal of the Proceedings of the City Council of the City of Des Moines, marked "Respondent's Exhibit B," at its meetings on the 6th, 20th and 21st of November, 1905, and offers in evidence therefrom Roll Call No. 1772, found on pages 557 and 558.

1641 Objected to on the part of the complainant, as being immaterial to any issue in controversy in this case.

Roll Call No. 1772, is as follows: "No. 1772. Communication signed by Robert Fullerton, *et al.*, by H. H. Coggeshall, Secretary of the Des Moines Civic League, asking that the City Solicitor be instructed on behalf of the City to join with the plaintiff in asking relief sought in the *quo warranto* suits brought against the Des Moines City Railway Company and Interurban Railway Co., presented, and on motion referred to the City Solicitor to report back at next regular meeting."

Respondent offers in evidence from the same pamphlet, "Respondent's Exhibit B," Roll Calls No. 1871 and 1872, found on pages 583 and 584 of said volume, showing the proceedings upon the passage of the resolution referred to in the Bill of Complaint in this case, and the vote upon the adoption of the Resolution, as follows:

"No. 1871. Report of City Solicitor on R. C. No. 1772, communication signed by Robert Fullerton *et al.*, asking that the City Solicitor be instructed on behalf of the City to join with the plaintiff in asking the relief sought in certain suits brought by said Robert Fullerton *et al.* against the Des Moines City Railway Company and the Interurban Railway Company for the purpose of determining the rights of the said companies to occupy and use the streets of the City of Des Moines, which said report gave a brief history of said cases, and recommending that some action be taken by the city

forthwith for the purpose of determining the rights of said companies to maintain and operate their lines upon and along the streets of the City of Des Moines, and stating that this determination ought to be brought about either by joining in the actions referred
1642 to in the communication or by independent suits in the name of the City, presented.

Resolution by Whitness;

Whereas, questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines; and

Whereas, It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

Be it resolved by the City Council of the City of Des Moines, That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surfaces and pavement, where paved, of all of the streets along which they now are operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

Be it further resolved, That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

Be it further resolved, That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith.

Moved by Higgins that the City Solicitor be instructed to join in the suits now pending. Substitute motion by Whitney that report of Solicitor be received and placed on file, and resolution
1643 be adopted. Substitute for all motions pending by Van Dyck that City Solicitor be instructed to take such action in the premises as he deems best. Motion lost.

No. 1872. Vote was then taken on Whitney's substitute motion that report of Solicitor be received and placed on file, and resolution be adopted, resulting in yeas: Christy, Fraley, Higgins, Myerly, Schaub, Smith, Van Dyck, Whitney, (8); nays: Sutherland (1)."

Int. 5. Mr. Bremner, do you remember the circumstances of the proceedings had by the City Council of the City of Des Moines, at the times referred to in the Roll Calls, No. 1772, on November 6, and Nos. 1871 and 1872 on November 21, 1905?

Answer. To some extent, yes, sir.

Int. 6. Have you a copy of the communication from Robert Fullerton and others, referred to in these proceedings?

Answer. I have; yes, sir.

Int. 7. Is the document marked "Respondent's Exhibit C" a copy of that?

Answer. It is; yes, sir.

Respondent offers in evidence, "Respondent's Exhibit C."

Objected to on the part of Complainant as being immaterial, irrelevant to any issue in controversy in this suit.

"Respondent's Exhibit C" is as follows:

"DES MOINES, IOWA, *Nov.* 6, 1905.

To the Honorable City Council of the City of Des Moines:

In the *Quo Warranto* suits brought against Des Moines City Railway Company and Interurban Railway Company, the City of Des Moines was made a party to the end that it might be able to
1644 join in the effort to settle the respective rights of the City and the railway companies. The companies now contend that the city alone can question their rights in the city.

You are therefore requested to direct the City Solicitor on behalf of the City to join the plaintiff in asking the relief sought in said matters.

ROBERT FULLERTON,
I. E. TONE,
E. R. CLAPP,
B. A. LOCKWOOD,
T. M. WALKER,
JOHN L. CAREY,
A. T. WATSON,
A. L. URICK,
C. E. CAMPBELL,
MAX SHLOSS,
C. W. MENNIG,
J. J. HAMILTON,
H. H. COGGSHALL,
By H. H. COGGSHALL,
Secretary of the Des Moines Civic League.

Filed 11/6/05.
N. B. VERTREES.

I, Geo. F. Poorman, City Clerk of the City of Des Moines, Iowa, hereby certify that the above and foregoing is a true and correct copy of a certain communication filed on the 6th day of November, 1905, in the Office of the City Clerk of the City of Des Moines, as it appears of record in said office, it being the communication referred to in the proceedings of the City Council of the City of Des Moines, at a meeting held on the 6th day of November, 1905, under Roll Call No. 1772, found on pages 557 and 558 of the printed Journal of the said City Council.

In witness whereof, I have hereunto set my hand and
1645 affixed my official Seal this 5th day of September, 1906.

[SEAL.] GEO. F. POORMAN,
City Clerk.

Int. 8. Mr. Bremner, have you a copy of the report of the City Solicitor referred to in Roll Calls No-. 1871 and 1872, offered in evidence?

Answer. I have, yes sir.

Int. 9. Is the document marked Respondent's Exhibit D a copy of that report?

Answer. It is; yes sir.

Respondent offers in evidence "Respondent's Exhibit D."

Objected to on the part of the complainant as being immaterial to any issue in controversy in this action.

Respondent's "Exhibit D" reads as follows:

"To the Honorable Mayor and City Council:

GENTLEMEN: Your Solicitor to whom was referred by roll call No. 1172, communication signed by Robert Fullerton *et al.* asking that the city Solicitor be instructed on behalf of the city to join with the plaintiff in asking the relief sought in certain suits brought by the said Robert Fullerton *et al. v.* The Des Moines City Railway Company and the Interurban Railway Company for the purpose of determining the rights of the said companies to occupy and use the streets of the City of Des Moines, begs leave to report thereon as follows:

These two actions were commenced for the September term of the District Court, and are what are know- as proceedings in 1646 *quo warranto.* They are special proceedings brought in the name of the State of Iowa for the purpose of determining whether the said companies are the owners of any franchise or franchises entitling them to maintain and operate their lines of railway on, along and over the streets and bridges of this city, or whether they have any right to maintain and operate their lines, and the plaintiff seeks to have the said railway companies ousted and excluded from maintaining and operating their lines.

I do not understand that it is the desire of the parties who have brought these actions to actually oust these companies from the streets of the city but they simply desire to ascertain whether the companies have any right to maintain and operate their lines under their present franchises, and, if not, to require them to secure new franchises.

The City of Des Moines was joined with the Railway Company as a defendant in both of these actions, the purpose thereof being to compel the City to join with the parties bringing the action in seeking the relief demanded.

In each of these actions the defendant railway company has filed a motion, which if sustained will have the effect of dismissing these actions, and as grounds for the motions, among other things, it is alleged, that the parties actually bringing the suit, who are known in the law as relators, the suit being brought in the name of the State of Iowa upon the relation of Robert Fullerton *et al.*, have not such interest in the question involved and the matters in controversy as entitle them to bring such an action as a relator, and also, because

it does not appear that any action has been taken by the City of Des Moines to terminate the rights of the defendant railway companies in the streets, and further alleging in substance, that the City is the only party which can question the rights of these com-
1647 panies to maintain and operate their lines.

It is for the purpose of meeting these objections that the city is now asked to join with the plaintiffs in asking the relief demanded against the railway companies in these actions. The motions referred to are to be argued in the District Court, Monday, Nov. 27.

It is not my intention in this report to attempt to give you my views upon the rights of these two companies to maintain and operate their lines within the City of Des Moines, but I beg leave to suggest that there is no more important question now before this City than the question of what rights these two railway companies have to maintain and operate their lines upon and along the streets of the City, and that a determination of these rights and a settlement of the continual agitation with reference thereto, is most desirable for all parties concerned. These rights can only be determined by resort to the courts. This determination must be had sooner or later.

If it is the wish of this council that such action be taken by this department as will lead to a settlement of these questions, this department will very cheerfully obey instructions to that effect.

This determination can be brought about in two ways: The City of Des Moines can by a proper pleading join with the plaintiff in the actions referred to in the communication filed by Robert Fullerton, *et al.*, and seek to obtain a final determination of these questions in those actions; or independent actions may be brought on behalf of the City of Des Moines to the same end. Such independent actions may be brought either in equity in the form of injunction suits, or as special proceedings in what is known as *quo warranto*.

There may be some question with reference to our right to
1648 join with the plaintiffs in the suits already started, but I am of the opinion that we have that right.

Respectfully submitted,

W. H. BREMNER,
City Solicitor.

I, Geo. F. Poorman, City Clerk of the City of Des Moines, Polk County, Iowa, hereby certify that the above and foregoing is a true and correct copy of a certain report, filed by W. H. Bremner City Solicitor, of the City of Des Moines, in the office of the City Clerk of said City, on the 17th day of November, 1905, as it appears of record in said office, it being the report referred to in the record of the proceedings of the City Council of the City of Des Moines, at a meeting held on the 21st day of November, 1905, under Roll Call No. 1871, found on page 583 of the printed Journal of the proceedings of the said City Council.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 5th day of September, A. D., 1906.

[SEAL.] GEO. F. POORMAN,
City Clerk."

Int. 10. What, if anything, Mr. Bremner, did you have to do with the preparation of the resolution contained in Roll Call No. 1871, as found on page- 583 and 584 of "Respondent's Exhibit B?"

Objected to on the part of Complainant as being irrelevant and immaterial because the action of the City is shown by its records, and the connection of the City Solicitor with the matter is immaterial, and cannot effect the result of what the City has done;
1649 it is also incompetent if it tends in any way to change and modify the records.

Answer. My attention was first called to the fact that the City Council or some members of the City Council were contemplating passing a resolution, of the nature of this resolution November 20th. November 20th was Monday, and I had been out of the city. I came in at noon and went direct to the City Hall, and some member of my department, I am not sure now who it was, called my attention to the fact that Mr. Whitney, member of the Council, had in his possession a resolution which this member of my department thought I ought to see before it was introduced. I immediately went to Mr. Whitney and asked to be allowed to see the resolution, and he showed me a resolution, the first three paragraphs of which were substantially the same as the first three paragraphs of the resolution found under Roll Call No. 1871; they were not exactly identical, but substantially the same. But the fourth paragraph was entirely different and contained an instruction to the Board of Public Works to proceed to remove and tear up the tracks of the Des Moines City Railway Company in case the Company itself failed to remove them. I told Mr. Whitney——

Complainant objects to what witness told Mr. Whitney, being hear-say and incompetent on that account, and also for the reasons urged against the question.

Ans. Cont'd. I told Mr. Whitney that a resolution in that form ought not to be be passed, and at my request he withheld it. The resolution was, I think, left in my possession; I am not sure as to that, but at any rate, between noon of November 20, and
1650 the evening of November 21, the resolution was redrawn by me and some small changes made in the first and third paragraphs, and the fourth paragraph entirely re-written, the instruction to the Board of Public Works to tear up and remove the tracks being taken out and the present paragraph instructing the City Solicitor to take such action as he shall deem advisable and necessary inserted in its place.

Int. 11. After the resolution was introduced before the Council by Mr. Whitney and while it was under consideration by the Council, state whether or not you were called before the Council to explain the resolution and its purpose, and if so, state what occurred?

Complainant interposes the same objection as last above urged.

Answer. I was called before the Council, or at least, I was before the Council and answered some questions with respect to the resolution. I don't think I would be able to give the exact language that was used, but I stated in response to various questions that the purpose of the res-lution was to lay the foundation for the commencement—no, I withdrew that last part with reference to laying the foundation. I was asked this question: as to whether or not, if this resolution was passed, the street railway company would not commence an action in the Federal Court and enjoin the City. I stated, that in my opinion, the passage of this resolution would not lay the foundation for such an action, as the only purpose of the resolution was to authorize the commencement of an action in the District Court for the purpose of testing the franchise questions then pending, and that the street railway company could not en-
1651 join the commencement of such an action.

I was also asked if I had any objections to being instructed to join in the cases then pending, brought by the Civic League against the street railway company and the Interurban Railway Company, to which we have referred as the *quo warranto* cases; and I said in reply to that question, if it was the wish of the council that we join in these cases, we would cheerfully do so, but I preferred to be left free to take such action as I saw fit. I didn't want my hands tied in any way but wanted to be free to join in these actions if I deemed it best; or to commence independent actions. I recall that Mr. Van Dyck offered during the consideration of this resolution, a motion in substance, that the City Solicitor be instructed to commence such action as he deemed best, and I stated to the council that that motion would be very satisfactory to me, I think that is all I now recall.

Complainant moves to strike — the answer of the witness for the reasons urged against the question, and further, because it is incompetent and secondary, and because the testimony is not competent for the purpose of modifying or changing the action of the City Council, as shown by its records.

Int. 12. State what you know as to whether in the passage of the resolution referred to, or any other action had by the officers of the City of Des Moines, there was any intention or purpose to obstruct or interfere with the Des Moines City Railway Company, or the operation of its railway, other than by bringing actions, or joining in actions in the courts?

Complainant interposes same objections as last above and
1652 for the reasons assigned in the motion to strike, and also because it simply calls for the opinion of the witness.

Answer. The City of Des Moines and its officers have, in so far as I know, never had any intention of interfering by physical force with the operation of the Des Moines City Railway Company, and the only purpose or intention which they have had, has been, to,

by suitable action in the District Court of Polk County, test the franchise rights of the Des Moines City Railway Company.

Complainant moves to strike the answer of the witness for the reasons urged against the question.

Answer Cont'd. Let me say further, that at the time that I went to Mr. Whitney, and asked for this resolution, in response to the first question, I told Mr. Whitney, that the reason that that resolution wouldn't do—that is the resolution which he had at that time—was because it would furnish a foundation for a suit in the Federal Court by the street railway company, and that I preferred to choose my own forum——

Counsel for complainant moves to strike the answer for all the reasons urged against the other portion of the answer to the same question.

Int. 13. Pursuant to the authority and direction to the City Solicitor given in the resolution referred to, what if anything have you done, or intended or attempted to do?

Objected to on the part of complainant as to the intention, as being irrelevant, immaterial, and not competent, and com-
1653 plainant objects to the balance of the question, because the evidence called for is secondary and not the best evidence.

Answer. Actions were commenced by the legal department of the City of Des Moines, for the January 1906 term I think, of the District Court of Iowa, in and for Polk County, in the name of the City of Des Moines, one against the Des Moines City Railway Company, and one against the Interurban Railway Company, asking for an injunction, restraining them from operating their lines of railway upon and along the streets of the city.

Int. 14. Has anything else been done by the Legal Department of the city of Des Moines, or the City Solicitor?

Answer. Nothing aside from what has been done in the present case.

Int. 15. Do you know, if so, you may state, where the resolution as originally in the hands of Mr. Whitney, originated?

Answer. I can't answer that question from personal knowledge. The understanding——

Complainant objects to the understanding as incompetent; the witness has no personal knowledge, and further that it is secondary evidence on the subject.

Answer. My understanding is, the original resolution was prepared either by the attorneys for the Des Moines City Railway Company or at their instance.

Complainant moves to strike the understanding of the witness and the statement of his understanding as being incompetent, secondary and not the best evidence.

Int. 16. Did you have any conversation with any attorney of the

Des Moines City Railway Company, or any attorney in its
1654 employ?

Answer. I did; yes, sir.

Int. 17. With whom, and what was your conversation?

Answer. While this matter was pending before the council, that is, between the time that I arrived at the City Hall, about noon of the 20th day of November, 1905, and the time of the passage of this resolution on the evening of November 21, I had interviews with R. B. Alberson, who is an attorney and is and was at that time in the employ of the street railway company as, I think the attorney in charge of their Claim Department.

Int. 18. State the substance of the conversation?

Objected to on the part of complainant as being incompetent, because it does not appear that Mr. Alberson ever had anything to do with this controversy, or any authority to act for the company.

Int. 19. Did Mr. Alberson come to you or you to him?

Answer. He came to me.

Int. 20. State the substance of the conversation?

Complainant urges the same objection last above made.

Answer. I can only give in a general way the subject of our conversation; I cannot recall it in detail. My recollection now is, that the first time Mr. Alberson came to me, he asked me what objection I had to the passage of the resolution in the form in which it was when I received it from Mr. Whitney. And I told him that it was evident that the intention in passing that, or attempting to pass it
or secure the passage of that resolution, was to lay the founda-
1655 tion for the trial of the franchise question in the Federal Court; that I had no objection to the passage by the council of a resolution which would lay the foundation for an action by the City, but that resolution as prepared by Mr. Whitney did not meet my approval and wouldn't. After the resolution was redrawn, and I think on the evening of the 21st, that is on the evening of the 21st, at the time or just before the council meeting, Mr. Alberson again came to me—that meeting may have been in the afternoon of that day, I am not positive, but I think it was in the evening—and we then had some discussion over the length of time which was to be given to the Des Moines City Railway Company, found in the third paragraph. I don't recall now what that discussion was or what it was about; I just know there was more or less discussion as to how many days should be inserted there. I don't even recall why it was discussed, except that I objected to too long a time, because I wanted to commence actions for the January Term.

Int. 21. In these conversations with Mr. Alberson, what if anything did you learn as to whether or not the Des Moines City Railway Company desired to have the Resolution passed as originally prepared, or as changed and prepared by you?

Complainant interposes same objection as last above; also calling for a conclusion and not for what was said.

Answer. Well, I hadn't any doc't, in my conversation with Mr. Alberson, but that the City Railway Company desired the passage of a resolution, at least similar, or somewhat similar to the one finally passed.

Complainant moves to strike the answer for the reasons
1656 urged against the question, because it is a mere statement of the conclusion of the witness.

Int. 22. As finally passed or originally drawn?

Complainant interposes the same objection as last above.

Answer. I meant, as originally drawn.

Cross-examination by N. T. GUERNSEY:

Cross-int. 1. Mr. Bremner, you referred to a couple of actions brought in the State Court, one entitled City of Des Moines *vs.* Des Moines City Railway Company, and the other City of Des Moines *vs.* the Interurban Railway Company and in each asking for an injunction; will you furnish us copies of the petitions in these cases?

Answer. I can; yes, sir. For the record, you mean?

Cross-int. 2. Yes?

Answer. Yes.

Cross-int. 3. These suits were both of them brought after the suit in which you are taking your testimony was commenced?

Answer. My recollection is, they were.

Cross-int. 4. And they are still pending and undetermined?

Answer. They are; yes sir.

Cross-int. 5. And the issues are not made up in either of them yet?

Answer. They are not; no sir.

I have here, Mr. Guernsey, what is supposed to be, at least a copy of the petition in the case of the City of Des Moines *vs.* Des Moines City Railway Company; also a copy of City of Des Moines *vs.* Interurban Railway Company. These copies I think are correct, although I have never compared them with the original.

1657 Cross-int. 6. The copies you refer to are the copies just marked, by the Examiner as Complainant's Exhibits 225 and 226?

Answer. Yes, sir.

Complainants offer in evidence these copies marked Exhibits 225 and 226, as a part of the cross-examination of this witness.

(Sgd.) W. H. BREMNER.

Subscribed in my presence and sworn to before me by the said William H. Bremner, this 15" day of September, 1906.

[SEAL.] (Sgd.) J. P. BLAISE.
Examiner, and Notary Public,
Polk County, Iowa.

Mr. BAILY: In the objections and motions, on the part of Respondent, in regard to complainant's exhibits, which were made on the 31st day of August, at the close of the cross-examination there

is no intention to recall or withdraw any waiver in respect to said exhibits made at any time theretofore.

The objection and motion which was made at the close of the cross-examination on the 31st day of August, does not apply to the copy of the Indianapolis Ordinance as offered by Complainant.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

1658 "COMPLAINANT'S EXHIBIT No. 225."

"In the District Court of the State of Iowa in and for Polk County, January Term, 1906.

CITY OF DES MOINES, Plaintiff,
vs.
DES MOINES CITY RAILWAY COMPANY, Defendant.

Petition.

The plaintiff for cause of action states:

Par. 1. That the plaintiff is a municipal corporation organized and existing under the general laws of the State of Iowa, relative to municipal corporations, and is a city of the first class.

Par. 2. That the defendant, Des Moines City Railway Company is a corporation organized under the laws of the State of Iowa, with its place of business in the City of Des Moines in said State. That it was so organized on or about the 24th day of July 1893, for the purpose of carrying on a railway and street railway business, and that it is now engaged in maintaining, using and operating in the City of Des Moines, and upon, over and along the streets, highways, avenues, alleys and bridges therein a system of street railways and the necessary tracks, electric wires, and poles or other supports thereof, and in the operation thereof uses as a motive power electricity transmitted over wires.

Par. 3. That in the maintenance and operation of the railway system, the Des Moines City Railway Company is now using and occupying all of the principal business streets and many of the streets in the residence portion of said city, and is operating its lines over many of the bridges crossing the Des Moines and Raccoon rivers in said city.

Par. 4. That on or about the 10th day of December 1866, the City of Des Moines duly enacted an ordinance entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Iowa;" that among other things, said ordinance provides as follows:

1659 "SECTION 1. Be it ordained by the City Council of the City of Des Moines: That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches,

in, upon, and along all the streets and such alleys only fronting on which said company have depots, stations, or car houses, and over the brides and such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep and maintain, use and operate thereon railway cars in the manner and for the time, and upon the conditions hereinafter mentioned and prescribed."

SECTION 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this state shall be used upon any of said tracks.

SECTION 3. Said tracks and railways shall be used for the purpose of transporting passengers and their ordinary *paggage*, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities; provided, said company shall at all times have the right to use their tracks for transporting iron, ties and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said Company.

Par. 5. That thereafter and on the 8th day of March, 1890, said ordinance was amended by an ordinance duly enacted, which amendment authorized the use of electricity as a motive power, to
1660 propel the cars operated under the provisions of the said ordinance of December 10, 1866.

Par. 6. That the defendant herein claims to be the successor of the Railway Company named in said ordinance as amended, to-wit: The Des Moines Street Railway Company — and claims the right to construct, maintain, and operate its system of street railways, street railway tracks, and wires, and other supports thereof, under and by virtue of said ordinance.

Par. 7. That the rights, privileges and franchises granted by said ordinance of December 10, 1866, as amended, absolutely ceased and determined by virtue of the terms of said ordinance on or about the 1st day of January, 1898, and the Des Moines City Railway Company, defendant herein, has no right to construct, maintain and operate its system of street railways under and by virtue of said ordinance.

Par. 8. That the Des Moines City Railway Company claims to be the owner of various other franchises granted by the City of Des Moines to various railway companies at various times prior to the year 1890, and claims to be the owner of various franchises granted by various municipalities to various railway companies prior to the year 1890, which said municipalities were incorporated in and became a part of the City of Des Moines on or about the year 1890.

Par. 10. That upon the trial of the case of the Des Moines City Railway Company *vs.* City of Des Moines, which said case was tried in the District Court of Iowa in and for Polk County, commencing

on or about the 25th day of September 1893, it being after the date upon which this defendant claims to have acquired all of the franchises which it now claims to own, Mr. J. S. Polk being President of the Des Moines City Railway Company, and being a witness for the defendant in said cause, testified that the Des Moines City Railway Company was operating its system of street railways in the city of Des Moines under and by
1661 virtue of the said ordinance of December 10, 1866, That said cause was a controversy between the same parties as the present case, and that the question involved in said case of the Des Moines City Railway Company *vs.* City of Des Moines were determined in favor of the Des Moines City Railway Company by reason of the provisions of the said ordinance of December 10, 1866, and by reason thereof this defendant is now estopped from claiming that it is operated under any other ordinance granting privileges or franchises, than the said ordinance of December 10, 1866.

Par. 11. That the Des Moines City Railway Company, defendant herein is engaged in maintaining and operating a system of street railways over, along and across the streets, avenues, highways, alleys, public places and bridges of the city of Des Moines without any right privilege or franchise so to do.

Par. 12. That the tracks, poles and wires of said defendant so constructed and maintained upon the streets, highways, avenues, and alleys of the City of Des Moines constitute a nuisance and an obstruction.

Wherefore plaintiff prays that it may be decreed herein that the defendant has no right, privilege or franchise to maintain and operate its system of street railways, with the wires, poles, or other supports thereof, along, upon, in, and over and across the streets, highways, avenues, alleys, public places, and bridges of the City of Des Moines, and that it be permanently enjoined from so maintaining and operating its system of street railways until or unless it shall take the necessary steps to secure a proper franchise for such purposes. And plaintiff further prays for such further relief as may be equitable in the premises, and for costs."

Signed and verified by

W. H. BREMNER.

(Endorsed:) Filed Sept. 17, 1906, E. R. Mason, Clerk.

1662 COMPLAINANT'S EXHIBIT No. 226.

In the District Court of Iowa in and for Polk County.

No. —. Eq.

CITY OF DES MOINES, Plaintiff,

vs.

INTERURBAN RAILWAY COMPANY, Defendant.

Petition.

For cause of action plaintiff states:

Par. 1. That the plaintiff is a municipal corporation, and a city of the first class organized and existing under and by virtue of the general laws of the State of Iowa, relative to municipal corporations.

Par. 2. That the defendant is a corporation for pecuniary profit, organized under the laws of Iowa, and engaged in the business of owning, constructing, maintaining and operating a system of electric interurban railways with the necessary tracks, wires, poles and other supports thereof; that is principal place of business is in the City of Des Moines, Iowa.

Par 3. That the defendant has constructed and is maintaining and operating within the corporate limits of the City of Des Moines various lines of interurban and street railways, which said lines are constructed, maintained, and operated over, along and across a number of the streets, highways and alleys of the City of Des Moines.

Par. 4. That said Interurban Railway Company has no franchise, right, or authority to construct, maintain or operate upon, over, or along or across the streets, highways, avenues and alleys within the corporate limits of the city of Des Moines its railways tracks, wires poles and other supports thereof.

1663–1772 Par. 5. That the city of Des Moines has never granted to the defendant herein any right or authority to maintain and operate its system of railways within the corporate limits of the City of Des Moines.

Par. 6. That the tracks, poles and wires of defendant so constructed and maintained upon the streets, highways, alleys and avenues of the City of Des Moines constitute a nuisance and an obstruction.

Wherefore plaintiff prays that it may be decreed that the said Interurban Railway Company, defendant herein, has not right, privilege or franchise to maintain and operate its system of railways upon, over and along the streets highways and alleys of the City of Des Moines, and that it be permanently enjoined from so maintaining and operating its system of tracks, together with the wires and poles and other supports thereof until or unless it shall take the necessary steps to acquire such right or privilege or franchise, and

for such other and further relief as is equitable in the premises and for costs.

Verified by

W. H. BREMNER.

* * * * * * *

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

1773 And afterwards to-wit, Nov. 16, 1906, there was filed in said Clerk's office in said Cause the Testimony on behalf of the Respondent of the witnesses, J. W. Budd, and Robert Fullerton, with the Certificate of Examiner J. P. Blaise, attached, which is in words and figures as follows, to-wit:

1774 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,

vs.

CITY OF DES MOINES, Respondent.

Testimony on the Part of Respondent.

Now, on this 27th day of September, 1906, at 2 o'clock P. M. before me, J. B. Blaise, Examiner, the further taking of testimony on the part of the Respondent is resumed as follows:

Appearances: Geo. H. Carr, W. L. Read, and N. T. Guernsey, Attorneys for Complainant. W. H. Bremner, W. H. Baily, and Howard J. Clark, Attorneys for Respondent.

J. W. BUDD, being duly sworn on behalf of Respondent, examined by Howard J. Clark, Esq., testified as follows:

Int. 1. Where do you reside?

A. 800 Euclid Avenue, Des Moines.

Int. 2. What is your business?

A. Civil Engineer.

Int. 3. How long have you been in the business of Civil Engineer?

A. About 12 years.

1775 Int. 4. What official capacity, if any, did you occupy in connection with the City of Des Moines as a municipality?

A. The office of City Engineer.

Int. 5. How long did you occupy that position?

A. Four years.

Int. 6. When, if at all, did your term expire?

A. It expired April 1st, 1906.

Int. 7. In your business or in the conduct of your business as City Engineer, and as engineer in the City of Des Moines, are you acquainted with the location of the streets and alleys and public grounds in the City of Des Moines, as to their widths and dimensions?

A. I think so.

Int. 8. Referring now, first, what is the street next to the Des Moines River, on the West side, running north and south, or along the river?

A. It is called front street.

Int. 9. What, if any public buildings, is that in front of?

A. In front of the City Library.

Int. 10. Does that street extend from Market Street on the South, north along the river to Grand Avenue on the north?

A. No sir; I think, as I remember, it does not extend further than Locust.

Int. 11. Further than Locust?

A. Yes, up to Locust.

Int. 12. It extends to Locust?

A. Yes, sir.

Int. 13. What is the next street?

A. Second Street.

Int. 14. Then the north and south streets through the City are umbered consecutively from 1 on west?

A. Yes, sir, they are.

1776 Int. 15. How as to the streets on the east side of the river, that is, the east side of the Des Moines River?

A. Well, the streets that are termed north and south streets are numbered, beginning at the River, numbered east from the river.

Int. 16. Beginning with what number?

A. Well, 1st, second, third, and so on.

Int. 17. As you go east, are they numbered consecutively from that on in regular order?

A. Yes, sir.

Int. 18. Out east how far?

A. East Thirtieth.

Int. 19. How far west from the Des Moines River are they numbered?

A. Well, I think somewhere in the Fifties.

Int. 20. Now, are the streets running east and west through the City, are not numbered, are they?

A. They are not, no, sir.

Int. 21. How are they designated?

A. By names.

Int. 22. Instead of by number?

A. Yes, sir.

Int. 23. Referring to the business center of the City, with reference to the lot occupied by the court house, what streets surround the Court House in the City?

A. Fifth street, east of the Court House; Sixth Street west, Mulberry north, and Cherry is south.

Int. 24. Now, taking that as a starting point, where is the present street car Waiting Room, with reference to the plot of ground occupied by the court house?

A. It is northwest of that, or on the Northwest Corner of Sixth and Mulberry.

1777 Int. 25. That would be diagonally across the street from the Northwest corner of the Court House Square, or plot of ground?

A. Yes, Sir.

Int. 26. Now, with reference to that point, the street car waiting room, Mr. Budd, where would you say is the business center of the City of Des Moines, on the West side of the Des Moines River?

A. Well I think, I would say about Sixth and Walnut.

Int. 27. Where is the Union Station, in Des Moines, from the Court House Square, or the ground occupied by the Court House?

A. It is immediately south of the Court House Square.

Mr. GUERNSEY: It is across on the other side of Cherry Street?

A. Yes, sir.

Mr. CLARK:

Int. 28. Does that Union Station occupy an entire block, the length of an entire block in the city, east and west?

A. Yes Sir.

Int. 29. And is there a street between the ground occupied by the Court House and the Union Station?

A. There is.

Int. 30. What Street is that?

A. That is Cherry Street.

Int. 31. Do you know how far it is between the curb lines of Cherry Street, between the ground occupied by the Court House and the Union Station?

A. I think that distance between the curbs there is 42 feet.

Int. 32. That would be the block then between Fifth Street and Sixth Street?

A. Yes, sir.

Int. 33. Now, I will ask you, Mr. Budd, if at that point where the Union Station comes out to Sixth Street, as to whether or not
1778 that street has been closed?

A. Sixth Street I think has been closed; yes sir.

Int. 34. That is not an open thoroughfare south of Cherry Street now, is it?

A. It is not, no.

Int. 35. Now, Mr. Budd, taking a territory we will say, with Front Street and Second Street on the west, on the west side of the Des Moines River, running, say, north to Grand Avenue, and then west to Sixth Avenue, and north on Sixth to High Street, and from High Street to Twelfth Street, and from Twelfth Street to Cherry, Street, and from Cherry to Fifth, east of Fifth, and then north on Fifth Street to Court Avenue, and from Court Avenue to Front Street on the east, what is the width of the streets between the curbs on that territory?

A. Most of them are 42 feet, I think.

Int. 36. What exception is there if any, to that?

A. The one I have in mind particularly, is Court Avenue, and I think it is about 60 feet wide.

Int. 37. Do you know of any other streets within that territory that are wider than 42 feet between the curbs?

A. No, I don't call to mind any.

Int. 38. Isn't it a fact that between the curbs on Walnut Street, in the City of Des Moines, at places it is narrower than 42 feet?

A. Yes, I think it is a little, and I am not sure but what some places it is a little wider.

Int. 39. But is it at any place substantially wider than 42 feet; do you remember any?

A. I don't think it differs far from that.

1779 Int. 40. Now, Mr. Budd, what street is immediately south of Cherry Street, in the City of Des Moines, on the west side of the River?

A. I think Vine Street is.

Int. 41. Where does Cherry Street begin, on the west side of the River?

A. It begins at Sixth, I believe—Fifth, I mean.

Int. 42. The east end of Cherry is at Fifth Street, is it not?

A. Yes, sir.

Int. 43. How far west does it extend, do you remember? Can you tell by examining this map?

A. This map would not show it, because it is in another section.

Int. 44. Does it go out a little beyond Twelfth Street?

A. I think somewheres near Twelfth Street.

Int. 45. It does not go but little farther than Twelfth Street to the West, does it, if any?

A. No, sir.

Int. 46. What territory or ground does it intersect with, or, does it terminate with at the west end?

A. The low land of the Coon River bottom, I think.

Int. 47. How is that land occupied, what is there on that—railroad tracks?

A. Yes, sir; railroad tracks.

Int. 48. Just at the end, I guess there are some buildings?

A. Yes, a few small buildings.

Int. 49. Then passing immediately west from that, there are railroad tracks?

A. Yes, sir.

Int. 50. How is Market Street occupied—where does Market Street begin, with the Des Moines River?

1780 A. Yes, sir.

Int. 51. Market Street is beginning with the Des Moines River and runs west, does it not?

A. If we think of it as West Des Moines.

Int. 52. How far west does it run?

A. I don't know just how far west it goes.

Int. 53. How is it occupied?

A. It is occupied largely by railroads.

Int. 54. Do you know on Market Street of any east and west thoroughfare for travel, except by railroad tracks?

A. No, sir, I do not.

Int. 55. Isn't there a foot passage way on Market, between Fourth

Street, east of third street along by the Cownie Glove Company and the Gilcrest Lumber Company?

A. Yes: I think there is; I am not sure if there is a sidewalk there or not.

Int. 56. There isn't any sidewalk; they use the sidewalk and all to ride on.

A. Yes, sir.

Int. 57. But Market Street from the Des Moines River west as far as the street goes, is occupied and taken up by the steam railroad tracks?

A. Yes, sir.

Int. 58. Is there any alley between Cherry Street and Mulberry Street, running east and west, from West Fifth Street west?

A. There is a street called Plum Street, west of Sixth Street.

Int. —. But that is north of Cherry?

A. Yes, sir.

Int. 60. Is there an alley between Market Street and Cherry Street west from Fifth Street, running west?

1781 A. I think not.

Int. 61. With what is that territory between Market and Cherry Streets taken up?

A. It is railroads and depots.

Int. 62. And warehouses?

A. Yes, sir.

Int. 63. We will take, Mr. Budd, between Cherry Street and Vine Street, is there any alley west from Fifth Street, and if so, what is it occupied with?

A. Well, I should say there is no alley: I suppose that answers the question.

Int. 64. What is the territory occupied by, Between Cherry Street and Vine Street, west from Fifth Street?

A. It is occupied by the railroads.

Int. 65. Is the Union Station also there?

A. The Union Station.

Int. 66. That part that is not occupied by railroads, what does occupy it?

A. It is occupied by depot and railroads, and some. I think there are some warehouses.

Mr. GUERNSEY: In the alley?

A. No, sir.

Int. 67. Now, Mr. Budd, what is there south now of Vine Street, what is it that occupies the territory between Vine street and the Coon River, south of Vine?

A. Well, there are some warehouses and some few small houses, and there are also some other railroad tracks, east and west tracks, and some manufacturing plants.

Int. 68. Is there any retail district of the city south of Vine Street?

A. No, sir, not to a great extend.

1782 Int. 69. There would be some small groceries?

A. Perhaps so.

Int. 70. But the business district of the city is north of Vine, is it not?

A. It is.

Int. 71. What is the business limit of the City on the north, what street would you say, street or streets?

A. Probably Grand Avenue would be about it.

Int. 72. And what one on the west?

A. I think Twelfth Street.

Int. 73. And what one on the south?

A. Cherry and Court Avenue.

Int. 74. Now, Mr. Budd, I wish you would state—is Third Street occupied by a street car line do you know, in the downtown district, within the territory that you have described?

A. No, sir, I don't think it is.

Int. 75. Is eighth Street a through street, if not, where does it terminate, running, we will say, from Walnut Street north?

A. It terminates at Pleasant Street.

Int. 76. Ninth Street is a through street leading north?

A. Yes, sir.

Int. 77. Is Tenth Street a through street north from Walnut?

A. Through to Pleasant Street.

Int. 78. Doesn't it extend further north than Pleasant Street?

A. Does not continue further north.

Int. 79. Now, as to eleventh Street, where is the north terminus of Eleventh Street north from Walnut?

A. About 130 feet north of Grand Avenue.

Int. 80. Is twelfth Street a through street: how far north does it extend?

1783 A. It goes north to High Street.

Int. 81. How wide is High Street?

A. High Street is 66 feet wide.

Int. 82. Do you know whether High Street is occupied by a street railway track?

A. It is not.

Int. 83. Is it at Twelfth Street?

A. It is at Twelfth and High?

Int. 84. And running on west from there, it is occupied by the street railway for a distance?

A. Yes, sir.

Int. 85. About how far is it from Mulberry and Court Avenue in West Des Moines, to the south line of the Coon River, to South Des Moines, say at First Street?

A. Why, I should judge it is about 600 or 800 feet.

Int. 86. And how far would it be to South Des Moines on Fifth Street?

A. It would be about a half mile.

Int. 87. And at Twelfth Street it would be a little greater than that, would it?

A. It would possibly be about the same as at Ninth.

Int. 88. And how far would it be at Ninth?

A. It would be a little over a half a mile.

Int. 89. Now, referring to the east side of the river, what would

you say, Mr. Budd, is the center of the business district on the east side of the river, at what location, the intersection of what streets?

A. About Fifth and Locust, in east Des Moines.

Int. 90. Now we will take it, Mr. Budd that this territory, we will say, from the Des Moines River east on Grand Avenue to east Ninth Street, and then south on east Ninth Street to Court Avenue
1784 and from Court Avenue west to the Des Moines River, and included within that territory and the river, what is the distance between the curb lines in those streets?

A. Most of them, I think; are about 42 feet; these streets vary in width a little, some are 66 feet and some 80.

Int. 91. Is Court Avenue wider on the east side of the river also?

A. Yes, sir; wider than any other street.

Int. 92. What is the part south of Court Avenue on the east side of the River occupied by, what is the territory taken up with?

A. South of Court Avenue in east Des Moines is mostly taken up with small buildings, and some warehouses, over there, I think.

Int. 93. Some manufacturing plants?

A. Yes.

Int. 94. Is there a good many railroad tracks south of that territory?

A. Yes, sir.

Int. 95. Do you know in regard to these new switch yards that have been put over there recently; they are south of Court Avenue, are they not?

A. Yes, sir.

96. Is there any business district, so-called, east of East Ninth Street?

A. No, sir, not to any great extent.

Int. 97. Is there any north of Grand Avenue on the east side of the river?

A. No, sir.

Int. 98. Within the territory given by the streets that I
1785 have described is the business district of the City on the east side included within that territory?

A. Yes, sir.

Int. 99. Now, what if any railroad occupies what is known as east Fourth Street?

A. The Chicago & Northwestern.

Int. 100. And that street is completely occupied by the tracks within the territory I have described?

A. Yes, sir.

Int. 101. The Chicago & Northwestern extending north on the east side from Court Avenue, goes in a northeasterly direction until it comes nearly to the Des Moines River?

A. It does.

Int. 102. And then passes out right along the bank of the river?

A. Yes, sir.

Int. 103. What is the distance—the right of way of the railroad comes right up to the river?

A. It does to the tile works.

Int. 104. Are there any streets west of east Fourth Street running north and south, that extend across the Des Moines River?

A. No, sir.

Int. 105. Now, we will take, say, east Fourth Street and follow it south from say Grand Avenue; how far is it from there down to the Des Moines River, from East Fourth and Court, or about how far?

A. Down to the Des Moines River, it is nearly a half a mile I think.

Int. 106. And that territory in there is occupied, as you have heretofore described, with small houses, some factories, warehouses and railroad tracks?

1786 A. Yes, sir, it is.

Int. 107. Mr. Budd, how many bridges are there across the river, the Des Moines river, public bridges for public travel, between east Des Moines and West Des Moines, at the present time?

A. Three bridges.

Int. 108. On what streets are they?

A. On Grand Avenue, Walnut, Locust and Court Avenue; there are four of them.

Int. 109. Are these bridges at this time occupied by street railway tracks?

A. Some of them are.

Int. 110. Which ones?

A. Walnut street, Grand Avenue and Locust.

Int. 111. And they all have double tracks on them, do they not?

A. Yes, sir.

Int. 112. The Court Avenue bridge, is that occupied by street railway tracks at this time?

A. I think not.

Int. 113. Is there a street railway track or tracks from the Des Moines River bridge, west to Fifth Street on Court Avenue?

A. No, there is none.

Int. 114. Is that street occupied by street car tracks?

A. Yes.

Int. 115. It has a double track from fourth street to Fifth; is there any double track on that?

A. I don't remember now.

Int. 116. Now, is East Court Avenue East of the Des Moines River occupied any of the distance by street railway tracks?

A. I think there is one block?

1787 Int. 117. Whereabouts is that, Mr. Budd?

A. As I remember, it is between Fourth and Fifth.

Int. 118. Is Front Street occupied by a street railway track on the West side of the Des Moines River south of Court Avenue?

A. Yes, sir.

Int. 119. That line runs down and crosses the railroad tracks and goes across the First Street bridge into South Des Moines, does it not?

A. Yes, sir.

Int. 120. Is east Walnut street occupied by a street railway track?

A. Yes.

Int. 121. Now, south of Walnut on the east side of the river, on east Fourth Street, running south there, is that street occupied by steam railroads, south of Walnut—you remember the Northwestern Station stops at Walnut,—and then on south there?

A. There is a track extends across the streets.

Int. 122. The entire street is taken up with steam railroad tracks on south to its junction with the other railroad tracks?

A. Yes, sir.

Int. 123. Referring to West Des Moines again, where is the termination of West Locust Street to the west from the Des Moines River?

A. I think it is about Sixteenth; possibly to an alley there.

Int. 124. It is to the alley then west of Sixteenth Street?

A. Yes, sir.

Int. 125. And terminates there?

A. Yes, sir.

1788 Int. 126. And Walnut street terminates where—I mean west from the Des Moines river?

A. It terminates at Sixteenth Street.

Cross-examination by N. T. GUERNSEY, Esq.:

C.-int. 1. How far do the tracks run south on east Fourth Street, south of Walnut?

A. Well, I don't know just how far they run; I know they cross the street there and connect with some other tracks, I suppose some of the Des Moines Union.

C.-int. 2. That is how far south of Walnut?

A. I think it is a couple of blocks, about that.

C.-int. 3. Do they go any farther south than that?

A. I wouldn't be positive just how far they go, but it is about two blocks.

C.-int. 4. Do you know whether they go further south than the Des Moines Union tracks or not?

A. No, I do not.

C.-int. 5. How far south does Fourth Street run there?

A. I think—I don't know whether it is on this map. I think it runs south to the river.

C.-int. 6. Is there a continuation of it south of the river?

A. Not the same line; no.

C.-int. 7. In what direction does Pennsylvania Avenue run?

A. There are parts of it run nearly north and south; other parts bear to the west further.

C.-int. 8. The principal part of it is a north and south street?

A. Yes, sir.

C.-int. —. What direction does Polk Boulevard run?

A. North and South.

1789 C.-int. 10. Which side of the river is Pennsylvania Avenue on?

A. The east side.

C.-int. 11. Polk Boulevard?

A. The west side.

C.-int. 12. So that not all the streets on either side are numbered?

A. No, sir.

C.-int. 13. That is simply the general rule?

A. Yes, sir.

C.-int. 14. The general rule is to give the east and west streets names?

A. I think they are all named; I don't remember of any that have numbers.

C.-int. 15. How long since you measured the distance between the curbs on these various streets?

A. Well, I don't call to mind anything, except recently measuring a curb on Walnut. I had occasion to do some work, a few days ago, on Sixth and Walnut I remember it was 42 feet.

C.-int. 16. Your information as to that is not based on specific measurements.

A. On measurements I have taken and reference to plats.

C.-int. 17. Walnut Street on East Fifth Street is five or ten feet wider than on the west?

A. It is 82½ feet east of Fifth, and west it is 66.

C.-int. 18. And there are more or less variations in the streets throughout the City?

A. Yes, they vary; I don't think of any of the other down town streets that vary as much as Walnut though.

C.-int. 19. What is the standard width of the streets between the lot lines?

A. In the old town of Ft. Des Moines, 66 feet; the old part of east Des Moines was 80 feet.

1790 C.-int. 20. This covers what you call the business sections on both sides?

A. Yes, sir.

C.-int. 21. Now you stated Sixth Street wasn't an open thoroughfare south of Cherry; how much of it was vacated there?

A. Well, I thought of all of it being vacated.

C.-int. 22. All the way south?

A. No, sir, just the block immediately south of Cherry Street; that is what I had in mind, immediately south of Cherry.

C.-int. 23. There is a street running east and west called Wagner Street, that was laid out when the Union Station was established there, running east and west, between Fifth and Sixth Streets, and between the east and west alley there?

A. Yes, sir; there is a Wagner street there.

C.-int. 24. You can get into the west end of that?

A. From Sixth street, yes, sir.

C.-int. 25. And that isn't but a half block south of Cherry?

A. I guess that is right.

C.-int. 26. So that you would want to modify what you said and say it is a half block?

A. Yes, I thought it was a block; it is only a half block.

C.-int. 27. Now how far south of Vine street does the City of Des Moines extend?

A. The City of Des Moines—probably two and a half miles.

C.-int. 28. You said south of Vine Street there were some warehouses and a few small houses and manufacturing plants?

A. That is what I meant, to the Coon River.

C.-int. 29. You mean between the railroads and the Raccoon river?

A. Yes, sir.

1791 C.-int. 30. Are there any stores on the corner of Twelfth and High Streets?

A. Yes, sir.

C.-int. 31. Are there any stores on the corner of Nineteenth and Crocker?

A. Yes sir.

C.-int. 32. Are there any stores west of there, on Cottage Grove Avenue?

A. I think there are some.

C.-int. 33. Are there any stores directly east, of Drake University, quite a number of them?

A. Yes sir.

C.-int. 34. Are there any stores upon the Clark Street line, about Twenty-first Street?

A. Yes, sir, I think so.

C.-int. 35. Are there any stores on West Grand, between Fourteenth and Fifteenth?

A. Yes sir.

C.-int. 36. Are there any stores around the corner of Sixth & School?

A. Yes sir.

C.-int. 37. Are there business houses along Sixth Street from there south to Grand Avenue?

A. Yes sir.

C.-int. 38. Are there stores at the corner of Ninth & School?

A. Yes sir.

C.-int. 39. Are there stores north of the river in what used to be Highland Park?

A. Yes sir.

C.-int. 40. Are all these on the west side of the river?

A. Highland Park is on the east side.

C.-int. 41. That is north of the river?

A. Yes.

1792 C. int. 42. Are any of those places inside of the business district you named?

A. They are not.

C.-int. 43. What part of the manufacturing and wholesaling in west Des Moines is done south of Court Avenue and Cherry?

A. I thought of Cownie's Glove Factory and several factories on Ninth Street.

C.-int. 44. Would you say that the majority of the wholesaling in West Des Moines was outside of the business district you named?

A. Possibly; there would be a good deal of it done outside of the district.

C.-int. 45. That is more of a retail district than the whole business district, and that is true of both sides of the river, isn't it?

A. Yes sir.

C.-int. 46. Eighth Street you stated didn't go through; how far north does Eighth Street go?

A. As far as Pleasant; and then there is Eighth Street North again.

C.-int. 47. Then it goes through to the river?

A. Yes sir.

C.-int. 48. This break there is two or three blocks?

A. Yes sir.

C.-int. 49. How about Tenth Street?

A. It is the same.

C.-int. 50. How about Eleventh?

A. Well there is a break of a few blocks.

C.-int. 51. There is a long break and then it runs north?

A. Yes sir.

1793 C.-int. 52. You stated it was 600 or 800 feet from Court Avenue to South Des Moines on Front Street; you hav-n't measured that?

A. That is just a guess; as I think of it, I think it is a little further.

C.-int. 53. It is one block to Vine, another block to Market, another block to Elm, and at least another one?

A. It would be about a quarter of a mile, I think.

C.-int. 54. Now, on this east side business district, outside of that is most of the wholesaling and most of the manufacturing on the outside?

A. Yes.

C.-int. 55. The fact is that on both sides of the river, we have near Walnut Street on both sides of it the business district, and then south of that, there are several blocks extending clear through the city, practically occupied by the steam railroads, and south of that there is but little residence or retail business this side of the Raccoon River?

A. Very little.

C.-int. 56. That is about the situation, isn't it?

A. Yes sir; it is.

Redirect examination by Mr. CLARK:

Int. 1. Mr. Budd, with reference to the stores that have been mentioned at Fifteenth and Grand, Sixth & School, and Highland Park, those are known as suburban stores, are they not?

A. I should think of them as such.

Int. 2. They are not, I imagine, what is known as the concentrated business district; that is within the territories you have described in your direct examination?

1794 A. Yes.

Int. 3. There is no office block at Sixth & School?

A. No sir.

Int. 4. Nor at any of these places mentioned, except some comparatively small retail establishments?

A. Yes sir; that is correct.

Int. 5. Mr. Budd, have you a blue print of the territory occupied by the business district that you have testified to and also south of section Four?

A. I have, and also as to the east one south of section Three.

Int. 6. You have the plat of section four and three and south of that?

A. Yes sir.

Int. 7. I will ask you to look at "Exhibit J" and state what that is?

A. That is a plat of section four, twp. 78 range 24, drawn to a scale of 200 feet to the inch, showing the width of the streets and alleys and the sizes of the lots.

Int. 8. The curb line of these streets there is a distance left for sidewalk inside of the street line?

A. Sidewalk and parking.

Int. 9. Is there any part north of the Coon River that is not shown on this plat?

A. Yes sir.

Int. 10. Will you prepare or attach to this exhibit J that portion that is not shown on this plat?

A. Yes sir.

Int. 11. Now, I will ask you to examine "Exhibit K" and state what that is?

A. That is a plat of sec. 3 Twp. 78 Rge. 24.

1795 Int. 12. That section is immediately east of section 4 and would be on the east side of the Des Moines River?

A. Yes sir; drawn to a scale of 200 feet to the inch and shows the size of the streets, alleys and lots.

Int. 13. Is there any part of the territory east of said River that you have described that is south of that portion in this exhibit?

A. Yes sir.

Int. 14. Will you prepare that and attach it to this "Exhibit K?"

A. Yes sir.

Recross-examination by Mr. Guernsey:

C.-int. 1. Who prepared the plat, Exhibit J?

A. That is prepared by taking a blue print from tracings in the City Engineer's Office.

C.-int. 2. Who prepared it?

A. I am unable to say.

C.-int. 3. When was it prepared?

A. I don't know.

C.-int. 4. Who made the tracings?

A. These tracings are tracings made by the employés of the City Engineer's Office; I am unable to say who made them; probably a good many men had part in helping to make them.

C.-int. 5. When were they made?

A. I don't know when they were made; they have been completed occasionally as some new condition or change was made, they were changed.

C.-int. 6. What I want to get at, what you know about it personally?

A. From my own personal knowledge and have known of them in the Engineer's Office about twelve years.

1796 C.-int. 7. Do you know who made them?

A. When I first knew the records in the Engineer's office these tracings was there; they have been changed occasionally some new ones have been made.

C.-int. 8. I am asking about the tracings for this "Exhibit J" do you know who made them?

A. I do not.

C.-int. 9. Do you know when they were made?

A. No sir, I do not.

C.-int. 10. Where did you get "Exhibit K?"

A. That is a copy of the same set of tracings.

C.-int. 11. It isn't a copy of Exhibit J?

A. From the same set of tracings, filed in the engineer's office.

C.-int. 12. Who made those?

A. I don't know.

C.-int. 13. Do you know when it was made?

A. No sir.

C.-int. 14. Do you know when the original tracings were made?

A. I do not.

C.-int. 15. You spoke about the sidewalk and parking; is there any parking in the business part of the city?

A. In some parts of it.

C.-int. 16. That you have named as the business center?

A. Yes sir.

C.-int. 17. Where is there any in West Des Moines?

A. Well, there is a parking on Grand Avenue.

C.-int. 18. Whereabouts?

A. As I remember it, along west of Sixth Street.

C.-int. 19. Whereabouts west of Sixth Street?

1797 A. I think there is a parking on Grand Avenue, most of the way from Sixth to Twe*n*fth, as I remember it now.

C.-int. 20. Do you know of any place on Grand Avenue, where there is a store, where the sidewalk in front of it is parked if so, name it?

A. No, I do not; I don't call to mind any. As a matter of explanation, the reason I made that statement of sidewalk and parking, I had in mind the ordinance regulating it, that they should be a certain size.

C.-int. 21. As a m*a*tter of fact, in the parts of the city actually used for business, there is very little parking?

A. There isn't any parking, as we consider it in the ordinary term as we use it.

C.-int. 22. But the space that you mentioned in regard to the ordinance is parking just the same?

A. Yes sir.

Re-redirect examination.

By Mr. CLARK:

Int. 1. These tracings from which these blue prints are made, are records in the Engineer's office?

A. Yes sir.

Int. 2. And kept and used by the Engineer, and a part of the records of the City?

A. Yes sir.

Int. 3. And these blue prints are made from that from time to time, as extended?

A. Yes sir.

1798 Re-recross-examination.

By Mr. GUERNSEY:

C.-int. 1. Under what provision of the statutes or ordinances do you say these are records in a legal sense; is there any ordinance or law that you know of that requires their being kept?

A. I don't know of any law, but I do know, what knowledge I have had of the Engineer's office, that they are kept there for record, both the public and the use of the city: that frequently private engineers come in with material and copy them. While I don't know of any law compelling that to be done, I do know they have been kept as such.

C.-int. 2. What you know, they have been kept there and used in connection with the transaction of the city's business?

A. Yes sir.

C.-int. 3. Used not only by your office but by other people?

A. Yes sir, and they are used by the surveyors generally in the City.

Re-re-redirect examination.

By Mr. CLARK:

Int 1. And belong to the city?

A. Yes sir, the tracings do.

Counsel for Respondent now offers in evidence Exhibits "J" and "K."

Objected to on the part of complainant as irrelevant and immaterial to any issue in controversy here, and also for the further reason that they are not properly identified, or shown to be correct;

1799 for the further reason, that there is no provision for the keeping of such records as this in the office of the City Engineer. (Exhibits J and K, as amended by the witness J. W. Budd, are hereto attached and returned herewith.)

(S'g'd) J. W. BUDD.

Subscribed in my presence and sworn to before me by the said J. W. Budd, this 16th day of October, 1906.

(Sgd.) J. P. BLAISE,

[SEAL.] *Examiner and Notary Public, Polk County, Iowa.*

(Endorsed:) Filed Nov. 16, 1906. E. R. Mason, Clerk.

ROBERT FULLERTON, being duly sworn on the part of Respondent, examined by Howard J. Clark, testifies as follows:

Int. 1. How long have you lived in the City of Des Moines?

A. Thirty years.

Int. 2. What is your business?

A. Lumber dealer.

Int. 3. Mr. Fullerton, are you familiar with the business district of the City of Des Moines, with reference to the retail, wholesale and manufacturing districts, and also what would be known more particularly as the concentrated business district of the City?

A. Yes, I have a pretty fair knowledge of it.

Int. 4. Referring now to West Des Moines, that part of Des Moines, west of the Des Moines River, what would you say,
1800 Mr. Fullerton, is the center of the business district or the concentrated business district?

A. Well, the center of it, according to my idea, would be about Sixth and Walnut, I should say.

Int. 5. What streets would you say would encompass this business district on the west?

A. Oh, about twelfth street, I should say.

Int. 6. And on the north?

A. Grant Avenue, practically; I think it might go possibly a street further north.

Int. 7. This is, as far north as High Street?

A. Still, there is nothing of any consequence as I know of.

Int. 8. What street on the south?

A. Well, the business really, the manufacturing and warehouse business extends south of Market Street, somewhat.

Int. 9. As far south as Market street?

A. Almost to the river, some places, down there in the Hubbell Addition.

Int. 10. Counting the Des Moines River on the east?

A. Yes, sir.

Int. 11. Now, Mr. Fullerton, what would you say was the center of the business district, the concentrated business district on the east side of the Des Moines River, in East Des Moines?

A. Well, I presume pretty near the same, Fifth and Walnut or Locust; I am not so familiar with that.

Int. 12. Now, is there any considerable business, business district outside of the territory, say, covered by Grand Avenue on the North, on the east side of the river, and East Ninth Street on the east, and Court Avenue on the south, on the east side of the river?

1801 A. I think that would embrace the retail business of East Des Moines.

Int. 13. There would be some manufacturing on the outside of that?

A. Yes sir.

Int. 14. The Agar Packing Company is way down below somewhere?

A. Yes, and some warehouses.

Int. 15. Now, you say that i on the east side of the river?

A. Yes.

Int. 16. The American Iron Works is not south of that?

A. No, the Des Moines Iron Works is over here across the River.

Int. 17. Well, if we would include in that on the east side of the river Elm street, it would practically take in all that manufacturing and retail district?

A. Yes, practically.

Int. 18. And the territory that you have given, gives the district so far as West Des Moines is concerned?

A. Yes sir.

Cross-examination by Mr. GUERNSEY:

C.-int. 1. There is more or less business outside of these districts?

A. Oh yes, there are corner groceries, the same as in any town.

C.-int. 2. There are some business centers like Fifteenth & Grand, for instance, within a block there, there are ten or fifteen stores?

A. Yes, but it is hardly recognized in the business district.

C.-int. 3. But there are a good many of those stores?

A. Yes, a good many stores, drug stores and groceries over the town; if you take the saloons as a demarkation of the business district, I don't think you would find any outside of
1802–1804 that territory.

Redirect examination by Mr. CLARK:

Int. 1. Within the territories that you have described, the great bulk of the retail and manufacturing business of the city of Des Moines is done, isn't it?

A. Yes.

Int. 2. As you say, there are small corner groceries, bakeries and drug stores outside?

A. Yes sir.

Int. 3. They are simply for the local trade, in a small way; that is true, is it not?

A. I think so. I don't think a real estate man would undertake to sell that as in the business district.

(Sgd.) ROBERT FULLERTON.

Subscribed in my presence and sworn to before me by the said Robert Fullerton, this 13th day of October, 1906.

(Sgd.) J. P. BLAISE,

[SEAL.] *Examiner and Notary Public, Polk County, Iowa.*

(Endorsed:) Filed Nov. 16, 1906. E. R. Mason, Clerk.

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1805 & 1806 EXHIBIT 224.

VOL. V. E. R. MASON, CLERK.

* * * * * * *

1807 *The Revised Ordinances of Nineteen Hundred of the City of Des Moines, Iowa.*

Published by Authority of the City of Des Moines.

Revised and Arranged by Wm. H. Baily.

1808 *Proceedings Authorizing and Providing for the Publication of Revised Ordinances of* 1900.

REPORT.

Office of Baily, Ballreich & Preston, Attorneys at Law. Des Moines, Iowa.

To the Honorable Mayor and City Council of the City of Des Moines:

GENTLEMEN: I submit for your consideration the revision of the ordinances of the city as arranged by me preparatory to the publication thereof. This revision contains all ordinances now in force, as well as those recently passed and approved by the Mayor, with the following exceptions:

All ordinances granting right of way and special privileges to railroad companies have been omitted, but a schedule of such ordinances in force is inserted in the proper place. Also there have been omitted a large number of ordinances in force establishing, changing, vacating, widening, narrowing and naming streets, alleys and highways, fixing curb and sidewalk lines, establishing special sidewalk grades, granting privileges to individuals in regard to drains, use of streets and alleys and the like; and other ordinances of a temporary, local or unimportant character.

To include these ordinances would greatly increase the cost of publication without any corresponding benefit to anyone. Ordinances hereafter passed in time can be inserted in the proper places in the revision as far as practicable, otherwise they can be printed in an appendix at the end of the book.

I have also prepared and submit for your approval a short historical sketch, which with a list of officers compiled by Mr. E. W. Woodruff, City Clerk, and the rules and order of business of the Council, are to be printed in the fore part of the book.

An index is still to be prepared and the sections to be numbered, but this will be completed in time for the printer.

I also submit for your consideration proper forms of resolutions approving the revision and providing for the publication thereof.

Respectfully submitted, WM. H. BAILY.

1809 *Resolutions.*

Resolution approving the revised ordinances of 1900, of the city of Des Moines, and ordering the publication thereof in book form.

Adopted December 14, 1899.

Resolved, by the City Council of the City of Des Moines: That the revision of the ordinances of the city as arranged and submitted by Wm. H. Baily, be and it is approved, and with any ordinances hereafter passed in time to be included therein, is ordered to be published in book form, as provided in section 687, of the Code. Said revision shall be known and designated as "The Revised Ordinances of 1900, of the City of Des Moines." There shall also be printed in said book the historical matter and list of officers submitted, and the rules and order of business of the Council, and an index.

Resolution providing for the publication of the "Revised Ordinances of the City of Des Moines."

Adopted December 14, 1899.

Resolved, by the City Council of the City of Des Moines: That the revised ordinances of 1900 shall be published in book form as herein provided:

1. The leaves shall be six inches wide by nine inches long, the printed matter to be four inches by seven inches; and the book shall be bound in buff buckram of best quality. Otherwise the quality, kind and character of paper, kind and size of type, quality, kind and character of binding and the workmanship in composition, printing and binding, and all other matters shall correspond with and be the same as the Code of 1897.

2. There shall be printed and bound 300 copies of such revised ordinances, which shall be distributed as follows: One copy each to the Mayor, each Councilman, the Solicitor, each Assistant Solicitor, each member of the Board of Public Works, City Clerk, Auditor, Treasurer, Engineer, Police Judge, Marshal, Deputy Marshal, Chief of the Fire Department; one copy to each Judge of the Supreme Court, each Judge of the Polk County District Court, and the Federal District Judge for Southern District of Iowa; two copies each to the City Library, State Library and Law Library of the State University; one copy to Wm. H. Baily; one copy to each city of the state having a population of 10,000 or more. The balance shall be deposited with the City Clerk to be by him sold at the price of one and fifty one hundredths dollars each, or to be otherwise disposed of as the Council may from time to time direct. All money received from sales thereof to be paid to the City Treasurer and duplicate receipts taken, one of which shall be filed with the Auditor and credited to the city general fund.

1810–1812 3. The City Clerk shall at once advertise for two publications each in two daily papers published in the city for sealed proposals for printing and binding said revised ordi-

nances as herein provided, the form of notice to be prepared by the solicitor, such bids to be filed not later than ten days after the first publication of such notice, and each bid to be accompanied by a certified check or cash deposit in the sum of $50.00 as security that the bidder will enter into contract and furnish a bond with corporate security in a penalty of $1,000 to secure performance thereof. The bids received shall be opened in the presence of the Council at the first regular or special meeting after the time for receiving the bids expires. The Council shall accept the best bid or may reject any and all bids received. Each proposal shall state the time within which the work will be completed and shall state the estimated number of printed pages on which the proposal is based and the amount which the price will be increased or diminished for each page which the book shall vary from the estimate.

4. The contractor shall furnish such number of proofs as the compiler shall require and make all corrections and changes required; the work shall be done under the supervision of the compiler and the committee on printing and subject to the approval and acceptance by the city council, whose decision shall be final.

STATE OF IOWA, *Polk County, City of Des Moines, ss:*

I, E. W. Woodruff, City Clerk, do hereby certify that the foregoing are true copies of the proceedings of the City Council of the City of Des Moines, authorizing and providing for the publication of the "Revised Ordinances of 1900 of the City of Des Moines," in book form.

Witness my hand and official seal this 19th day of December, 1899.

[SEAL.]

E. W. WOODRUFF,
City Clerk of City of Des Moines.

* * * * * * *

1813 The first sale of lots in the town was at auction July 15, 1846; Peter Meyers, Auctioneer.

On September 6, 1851, notice was given of an election to be held September 22, 1851, to determine whether the town of Fort Des Moines should be incorporated. At this election forty-three votes were cast, all but one being in favor of incorporating. At an election held on September 27th, P. M. Cassady, L. P. Sherman and Rev. Thompson Bird were selected to draft a charter, which was reported October 11th and adopted at an election held October 18, 1851, at which twenty-five votes were cast, all in favor of adopting the charter. The town so incorporated included the plat of the original town of Fort Des Moines, Fagan's (now Hoxie's) Addition, and Commissioner's Addition, about 200 acres.

The first town Council elected October 20, 1851, consisted of Rev. Thompson Bird, P. M. Cassady, Jesse Dicks, W. T. Marvin, C. D. Reinking, Hoyt Sherman, L. P. Sherman and R. W. Sypher, and held its first meeting October 25th. Rev. Thompson Bird was elected president; J. K. Dollison was elected Recorder; Samuel Gray, Treasurer, and John Youngerman, Marshal.

The town continued under this charter until the Fourth General Assembly passed "An act to incorporate the Town of Fort Des Moines" approved January 18, 1853. The town thus incorporated was included within the following limits: Beginning at the junction of the Des Moines and Raccoon rivers at the center of the channels thereof, in the county of Polk, thence up the channel of the Des Moines river to the point where the half mile line of Section No. 4, Township 78, north of Range 24 west, according to the United States survey, crosses said river; thence west along said half mile line to the northwest corner of the southwest quarter of said section; thence south along the section line between Sections 4 and 5 and 8 and 9 to the center of Raccoon river; thence down the center of said river to the place of beginning, and contained about 600 acres.

The next change was March 7, 1857, when the city of Des Moines was organized as a special charter city under Chapter 185, Acts of the Sixth General Assembly, entitled "An act to incorporate the City of Des Moines in Polk County." The territory included Sections 2, 3, 4, 5, 8, 9, 10 and 11, Township 78, Range 24.

The city continued to act under the above special charter until March 9, 1863, a citizens' petition was presented asking the Council to submit to the electors the question of abandoning the special charter and organizing under the general incorporation laws pursuant to Chapter 25, Acts of extra session of Ninth General Assembly. The question was submitted at a special election
1814 held on the first Monday in May, 1863, and resulted in 485 votes in favor of abandonment to 77 against, and the city proceeded to organize under the general incorporation laws. If there was any irregularity in these proceedings it was cured by Chapter 99, Acts of Twelfth General Assembly, which took effect April 22, 1868.

The next important change occurred in the spring of 1890. Although the city had grown in wealth and population there had been no extension of its boundaries since 1857 and a number of suburban towns had grown up and been incorporated adjoining the city.

As before stated, the City of Des Moines included: Sections 2, 3, 4, 5, 8, 9, 10 and 11, Township 78, Range 24; about 5,410 acres.

The City of North Des Moines, incorporated in 1880 and organized as a city of the second class in March, 1890, included: East half Section 33, all Section 34, southeast quarter and south half of northeast quarter Section 27, and all that part of Section 35, southeast quarter of Section 28 and southwest quarter of Section 27, lying south and west of Des Moines river, Township 79, Range 24; about 1,620 acres.

University Place, incorporated in 1883, included northeast quarter of Section 6, Township 79, Range 24, and southwest quarter of Section 33 and east half southeast quarter of Section 32, Township 79, Range 24; about 436 acres.

Greenwood Park, incorporated in 1881, included south half Section 6, all Section 7 and all Section 18 lying north of Raccoon river, Township 78, Range 24; about 1,160 acres.

Sevastopol, incorporated in 1877, included northeast quarter of Section 15 and northwest quarter of Section 14, Township 78, Range 24; about 320 acres.

Gilbert (Chesterfield), incorporated in 1882, included all of Section 12, Township 78, Range 24, lying north of Des Moines river; about 505 acres.

Grant Park, incorporated 1888, included Section 1, Township 78, Range 24, and all Section 6 and north half Section 7, Township 75, Range 23; about 1,762 acres.

Easton Place, incorporated 1889, included Section 31, Township 79, Range 23; about 640 acres.

Capital Park, incorporated 1884, included Section 36 and all of Section 35 lying east and north of Des Moines river, Township 79, Range 24; about 1,047 acres.

In addition to the above there was in the Highland Park, Oak Park and Clifton Heights districts and elsewhere, considerable platted territory not yet incorporated.

The matter of bringing all this territory under one corporation was agitated for some time and resulted in the appointment, by the Commercial Exchange, of a committee of seven, consisting of
1815 B. F. Kauffman, Chairman, Hon. C. C. Cole, Hon. John Mitchell and Dr. R. I. Chase, from the city of Des Moines. Wm. H. Baily, from North Des Moines; W. L. Read, from Capital Park, and A. A. Haskins, from University Place. This committee prepared a bill, which with some unimportant amendments became Chapter 1, Acts Twenty-third General Assembly, and took effect March, 1890.

This act extended the boundaries of the city two and one-half miles east, north and west, and one and one-half miles south, so as to include the adjoining incorporated territory, and considerable unincorporated territory, and terminated the term of all officers in office in the original city and annexed towns.

The officers who were thus legislated out of office were, as far as can be ascertained:

In the City of Des Moines: Mayor, J. H. Campbell; Solicitor, Walter McHenry; Auditor, Nixon P. Jones; Treasurer, J. J. Pederson; Engineer, M. M. Carss; Police Judge, Tom Burke; City Clerk, I. A. Hammer; Market Master, Philip Nau; Marshal, Sol Stutsman; Board of Public Works, M. H. King and Martin Tuttle; Councilmen at Large, L. J. Wells, H. R. Reynolds; First Ward, M. Drady; Second Ward, J. C. Macy; Third Ward, G. W. Sheldon; Fourth Ward, H. M. Rollins; Fifth Ward, J. Cunningham; Sixth Ward, A. G. Hammer; Seventh Ward, J. P. Smith.

In City of North Des Moines: Mayor, S. C. Wherry; Recorder, W. B. Tompkins; Treasurer, Nelson Royal; Attorney, Wm. H. Baily; Marshal, W. H. Crydler; Street Commissioner, G. A. West; Councilmen: First Ward, E. Conrad, L. W. Shoonover; Second Ward, C. J. Meerdink, T. A. Copperstone; Third Ward, J. H. Hill, J. I. Dailey.

In University Place: Mayor, E. Dewey; Recorder, J. D. Butterfield; Treasurer, —— Kiehls; Attorney, A. A. Haskins; Street

Commissioner, C. F. Slayton; Trustees, E. D. Smith, H. D. Reeves, J. F. Rollins, Norman Haskins, E. D. Gaston, E. P. Ashford.

In Greenwood Park: Mayor, A. N. Denman; Recorder, C. B. Kauffman; Treasurer, C. H. Getchell; Trustees, J. H. Windsor, C. H. Getchell, W. M. McCain, E. R. Mason, Frank Pelton, Washington Miller.

In Sevastopol: Mayor, R. F. Young; Recorder, O. B. Fields; Marshal, J. G. Munzenmaier; Treasurer, E. E. Farr; Attorney, S. D. Laws; Trustees, G. Munzenmaier, Caleb John, Jerry Story, W. M. Williams, Chas. Riley.

In Capital Park, Mayor, W. W. Wise; Recorder, J. C. Tate; Treasurer, Geo. W. Baker; Marshal, Adam Byram; Trustees, W. R. Ankeney, H. P. Holmes, Geo. Rankin, J. N. McDowell, D. F. Witter, John Koenigsberger.

In Easton Place: Mayor, J. F. N. Drake; Recorder, John H. Nichols; Marshal, Peter Nye; Trustees, Isaac Herring, John Abernathy, G. W. Beall, Edward Gallager, Andrew Jackson.

1845–1848

In Grant Park: Mayor, M. F. Waters; Recorder, E. E. Moon; Marshal, Chas. E. Mead; Treasurer, Geo. P. Curran; Trustees, J. W. Shackelford, Lincoln Shackelford, L. W. Barlow.

In Gilbert: So far as can be ascertained no officers were ever elected in this town after the first election in 1882, and the names of those then elected can not be learned.

The officers elected for the enlarged city qualified and organized the city government on the 20th day of April, 1890. They were: Mayor, J. H. Campbell; Solicitor, Hugh Brennan; Auditor, S. W. Baker; Treasurer, John Pederson; Engineer, M. R. Laird; Police Judge, Frank Eggleston; Alderman-at-large, I. E. Tone, H. R. Reynolds; First Ward, C. C. Lane; Second Ward, Geo. W. Sheldon; Third Ward, S. C. Wherry; Fourth Ward, Conrad Youngerman; Fifth Ward, J. P. Smith, Sixth Ward, F. D. Hussey; Seventh Ward, L. W. Barlow. R. B. Dennis was appointed City Clerk, and R. S. Finkbine and R. L. Chase members of the Board of Public Works.

The Council of the enlarged city on July 15, 1890, passed an ordinance defining the boundaries of the city; this ordinance is the first one printed in the following revision. The city as thus bounded contains about 35,264 acres or about 55 1-10 square miles.

The validity of this annexation of territory was questioned by some, but on April 10, 1891, the legislature enacted Chapter 12, Acts Twenty-fifth General Assembly to legalize the annexation of territory to cities of the first class in certain cases and on January 21, 1896, the matter was finally put at rest by the decision of the Supreme Court in the State of Iowa, *ex rel.*, A. G. West *vs.* City of Des Moines, 96 Iowa, 521.

* * * * * * *

1849 REVISED ORDINANCES.

TITLE II.

Organization, Officers, Records.

CHAPTER I.

Boundaries, Wards and Precincts.

An ordinance describing the boundaries and wards of the City of Des Moines.

No. 507, passed July 15, 1890.

Be it ordained by the City Council of the City of Des Moines:

SECTION 17. *Boundaries of City.*—That the boundaries of said City are defined and hereby declared to be as follows: Commencing at the center of Section 23, in Township 78, north of Range 25, west of the 5th P. M.; thence east along the east and west center lines of Sections 23 and 24, township and range aforesaid, Sections 19, 20, 21, 22, 23 and 24, Township 78, Range 24; Sections 19 and 20, Township 78, Range 23, to the center of Section 20, Township 78, Range 23; thence north along the north and south center lines of Sections 20, 17, 8 and 5, Township 78, Range 23, to the quarter section corner on the north line of Section 5, aforesaid; thence north on a continuation of said center line last mentioned to the east and west center line of Section 21, Township 78, Range 23, thence west on the east and west center line of Sections 21, 20 and 19 of Township 79, Range 23, and Sections 24, 23, 22, 21, 20 and 19 of Township 79, Range 24, and Section 24 of Town-ship 79, Range 25, to a point where a continuation of the north and south center line of Sections 2, 11, 14 and 23 in Township 78, Range 25, intersects said east and west center line last mentioned, thence south on a continuation of the north and south center line of Sections 2, 11, 14 and 23, last mentioned, to the quarter section corner on the north line of said Section 2; thence south on the north and south center line of Sections 2, 11, 14 and 23, in Township 78, Range 25, to the center of said Section 23; and the authority and jurisdiction of the City and its officers shall be co-extensive therewith in all cases.

SEC. 18. *To be Seven Wards.*—SECTION 2. That the territory embraced within said City shall be and is divided into seven
1850 (7) wards, of which the boundaries are defined in the report of the commissioners appointed under the provisions of chapter one (1) of the Acts of the Twenty-third General Assembly of Iowa, which report is on file in the office of the Clerk of the District Court of Polk county, Iowa, and a duplicate thereof is on file in the office of the City Clerk of the City of Des Moines.

An ordinance describing the boundaries of the wards and voting precincts of the city of Des Moines.

No. 996, passed October 30, 1899.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That the territory embraced within the City of Des Moines shall be and is divided into seven wards of which the boundaries are as follows:

SEC. 19. *Boundaries.*—First Ward. The First ward shall embrace all of that portion of the City lying west of a line described as follows, to-wit: Beginning on the south line of the City, in the center of Section 21, in Range 24, running thence north through the center of Sections 21, 16 and 9, to the middle of the Raccoon river; thence westward along the channel of said river to a point directly south of the southern terminus of the middle of Nineteenth street; thence north to Grand avenue; thence east on Grand avenue to Seventeenth street; thence north on Seventeenth street to the north line of Section 5, in Township 78, Range 24; thence west on the north line of said Section to Twentieth street; thence north on Twentieth street to the Des Moines river; thence along the middle of the said river to the north line of the City.

SEC. 20. *Boundaries.*—Second Ward. The Second ward shall include all of the territory lying east of the First ward, and west of a line beginning at a point in the middle of the Raccoon river where it is intersected by the east line of the First ward; thence down the middle of said river to the center of Ninth street; thence north along the center of said Ninth street to Market street; thence west on Market street to Tenth street; thence north on Tenth street to Pleasant street; thence west on Pleasant street to the alley immediately east of lot 2 in sub-division of lots 3 and 4 of Rose's addition; thence north on said alley to Park street; thence east on Park street to Eleventh street; thence north on Eleventh street to Jefferson street; thence west on Jefferson street to the west line of the plat of Prospect Park; thence directly north to the Des Moines river; thence westward along the middle of the said river to the east boundary line of the First ward.

SEC. 21. *Boundaries.*—Third Ward. The Third ward of the City shall embrace all of the territory lying east of the boundary
1851 lines of the First and Second wards above given, and west of the following line: Beginning at the point above designated in the middle of the Raccoon river as the beginning point of the east boundary line of the Second ward; running thence eastwardly down the Raccoon river to the middle of Seventh street; thence north to the southern terminus of Sixth avenue, south of Elm street, thence north on Sixth avenue to Elm street; thence east on Elm street to Fifth street; thence north on Fifth street to Grand avenue; thence west on Grand avenue to Sixth avenue; thence north on Sixth avenue to the middle of the Des Moines river; thence down the said river southeastwardly to a point opposite the center of Section 35, in Township 79, Range 24; thence east to the center of said

section; thence north through the center of Sections 35, 26 and 23 to the north line of the City.

SEC. 22. *Boundaries.*—Fourth Ward. The Fourth ward shall consist of all that portion of the City lying east of the east boundary lines of the First and Third wards and west of the following line: Beginning in the center of Section 22, on the south line of said City; thence north through the center of Sections 22, 15 and 10, to the middle of the Des Moines river; thence northerly up the middle of the Des Moines river to Sixth avenue bridge where it crosses the said river.

SEC. 23. *Boundaries.*—Fifth Ward. The Fifth ward shall consist of all of that portion of the said City lying east of the east boundaries of the Third and Fourth wards and lying west of a line as follows, to-wit: Beginning in the middle of the Des Moines river where it is intersected by the center line running north through Section 10, Township 78, Range 24; thence eastwardly along the midde of said river to a point opposite Seventh street; thence north on Seventh street to Locust street; thence north from Locust street on Pennsylvania avenue to Maple street; thence west on Maple street to the center of Pennsylvania avenue on the north side of said street; thence north on Pennsylvania avenue to Fremont street; thence east on Fremont street to Twelfth street; thence north on Twelfth street to Washington avenue; thence east on Washington avenue to the east section line of Section 35 above referred to; thence north on the east line of said section and upon the east lines of Sections 26 and 23 to the north lines of the City.

SEC. 24. *Boundaries.*—Sixth Ward. The Sixth ward shall be composed of all that portion of territory lying east of the east boundary lines of the Fourth and Fifth wards, and west of the following lines: Beginning in the center of Section 23, on the south line of said city, Range 24; thence north through the center of Sections 23, 14 and 11, to the Des Moines river, thence up the middle of the said
1852 river to a point opposite and south of the southern terminus of Sixteenth street; thence north on Sixteenth street to Walker street; thence northwesterly on Walker street and Easton boulevard to the east line of Section 36; thence northward on the east lines of said Section 36, in Range 24, and of Sections 25 and 24 to the north line of the city.

SEC. 25. *Boundaries.*—Seventh Ward. The Seventh ward shall comprise all that portion of the City lying east of the east line of the Sixth ward, as above fixed.

SEC. 26. *Precincts.*—SEC. 2. That each of said wards shall be and is divided into several election precincts which shall remain as they were at the General Election of 1899 until changed by resolutions of the City Council. At City elections the election precincts shall be the same as at the last preceding General Election.

SEC. 27. *Repeals.*—SEC. 3. That Section 2 of Ordinance No. 507, and Ordinances 561, 581, 670, 694 and 726, and all other Ordinances and parts of Ordinances in conflict herewith are hereby repealed.

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1853 CHAPTER III.

City Officers.

An ordinance to provide for the election and qualification of certain city officers, fix their salaries and to define their powers and prescribe their duties.

No. 997, passed October 30, 1899.

Be it ordained by the City Council of the City of Des Moines:

SECTION 31. *Officers, when Elected and Qualified.*—SECTION 1. That there shall be elected at the regular biennial election a Mayor, Solicitor, Treasurer, Auditor, City Engineer, Assessor, Police Judge, Superintendent of Markets, who must be qualified electors residing within the city, and they must before entering upon the duties of their respective offices, and within ten days after the result of the election is declared by the canvassers, qualify by taking the oath of office and executing an official bond in a penalty hereinafter fixed with sureties approved by the City Council, which oath and bond shall be filed with the City Clerk.

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1854 SEC. 34. *City Solicitor's Bond and Salary.*—SECTION 4. The Solicitor shall give a bond in the penal sum of $2,000 and shall receive a salary of $2,000 per year, payable in monthly installments, and shall keep an office at the City Hall.

SEC. 35. *Powers and Duties of Solicitor.*—SECTION 5. The Solicitor shall have and exercise all of the powers and perform all the duties provided or prescribed by law or the Ordinances of the City. It shall also be his duty to prosecute or defend all suits to which the City is a party in all the courts of the City, State and United States, to prosecute all suits for violation of any City Ordinance, and all criminal prosecutions before the Police Court. He shall when requested or whenever in his opinion it is necessary advise the City Council and the Officers of the City upon all legal questions relative to the business of the City or matters in which the City is interested, which advice shall whenever practicable be given in writing. He shall draw all contracts to which the City is a party. He shall examine and report in writing to the City Council upon all Ordinances prior to their final passage by the City Council.

SEC. 36. *To Keep a Docket.*—SECTION 6. The Solicitor shall keep as a part of the records of his office a docket of all cases wherein the city is a party, and shall enter in said docket a history of all proceedings had in such cases. He shall deliver the said docket, together with all books, papers and documents in his possession belonging to the city or pertaining to its business to his successor in office. He shall keep and preserve as a part of the records of his office, copies of all printed abstracts, briefs and arguments in all cases in which the city is a party, or is interested, and the same shall

from time to time be bound in permanent form at the expense of the City, and shall be transmitted to his successor in office.

SEC. 37. *Assistant Solicitors, Appointment, Salaries and Duties.*—SECTION 7. There shall be appointed by the Solicitor, subject to approval and confirmation by the Council, an Assistant Solicitor, who shall before entering upon the duties of his office, file with the City Clerk, his official oath. He shall receive a salary of $1,200 per year, payable in monthly installments, and shall perform such duties as the Solicitor shall direct or require. The Solicitor shall also appoint a second Assistant, subject to the approval and confirmation by the City Council. He shall before entering upon performance of his duty, file his official oath with the City Clerk. He shall receive a salary of $600 per year, payable in monthly installments, and shall under the direction of the Solicitor, prosecute all cases in the Police Court, shall render such assistance as may be necessary to the Marshal and Policemen, Health Officers, and City Officers, in the preparation of informations in cases in the Police
1855–2230 Court, and he shall perform such other duties as may be required or assigned by the Solicitor.

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2231

TITLE XXII.

Street Railways.

CHAPTER I.

Street Railway Regulations.

An ordinance requiring street railway companies or other persons operating the same, to equip and provide their cars with fenders.

No. 960, passed March 28, 1899.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1287. *Provide Fenders.*—SECTION 1. That every person or corporation controlling and operating any street railway in the City of Des Moines, shall equip the front end of each of its motor cars, used in carrying passengers along and over its said road or roads, with a fender of the basket type, (similar to the Providence Fender, manufactured by the Consolidated Fender Company, of Providence, Rhode Island). Said fender shall be firmly attached to the front end of said motor cars and maintained thereon at all times when the same are employed in service on its road or roads, to the end that as far as may be, all persons may be protected from injury or damage by coming in collision with said cars.

SEC. 1288. *Penalty.*—SECTION 2. That any person or corporation violating this ordinance, upon conviction thereof, shall be fined not less than $10, nor more than $50 for each offense. To run one car for any one day or part thereof, after the time herein provided without such fender, shall constitute a separate and distinct offense.

SEC. 1289. *Take Effect.*—SECTION 3. This ordinance shall take effect and be in force from and after the first day of July, 1899, and after it has been published as required by law.

2232 An ordinance to regulate the cleaning of snow and ice from railway and street railway tracks in the City of Des Moines, and to require the removal of the same from the streets.

No. 1066, passed January 2, 1900.

Be it ordained by the City Council of the City of Des Moines:

SEC. 1290. *Removal of Snow and Ice From Streets.*—SECTION 1. It shall be unlawful to deposit any snow, ice or other accumulations removed from any railway or street railway tracks, or from the space or right-of-way occupied by such tracks, upon or along any portion of any paved street or alley within the prescribed fire limits of the City of Des Moines, or to suffer any such snow, ice or other accumulations to be so deposited; *provided*, that snow, ice or other accumulations may be removed by plows, scrapers, brushes or shovels from such railway or street railway tracks and deposited temporarily upon the portion of the street or alley along such tracks, but all snow, ice or other accumulations so deposited upon any such street or alley shall be promptly removed therefrom within forty-eight hours thereafter.

SEC. 1291. *Penalties.*—SECTION 2. Upon failure of any person, firm or corporation controlling, operating or using any railway or street railway tracks in the City of Des Moines, to remove from any paved street or alley along any such railway or street railway tracks, as herein provided, snow, ice or other accumulations so deposited thereon, the Board of Public Works shall have power to remove the same, and the cost thereof shall be charged to such person, firm or corporation and collected by an action at law therefor.

SEC. 1292. *Additional Penalties.*—SECTION 3. Any person, firm or corporation violating any of the provisions of this ordinance, shall on conviction thereof, be punished by a fine of not less than $10, nor more than $100.

An ordinance defining certain offenses, prohibiting the doing of certain acts, and providing for the punishment of violations thereof.

No. 349, passed May 10, 1886. [Chap. 14 R. O. 1881.]

Be it ordained by the City Council of the City of Des Moines:

SEC. 1293. *Throwing Stones.*—SECTION 83. No person shall throw any stone, brick-bat, wood or other substance at or into any street car, or at any person in or on said car.

SEC. 1294. *Obstructions.*—SECTION 84. No person shall place any wood, stone or other substance on the track of any street railway in such a manner as to obstruct the cars of such railway, or to throw the cars thereof off of said track.

2233 SEC. 1295. *Penalty.*—SECTION 85. If any person upon being requested by an employé of a street railroad company, or the person operating such road, to desist from smoking or spitting tobacco juice in a street car, fails immediately so to do, or if any person uses obscene, profane or indecent language, or engage in any quarrel on or in such cars, or if any person without permission take a dog on or in such car, or fails on demand to pay the proper fare on or in such car by delivering the money or a check, or by depositing the same in a fare box as may be required by such employé, or in default thereof shall not immediately leave the car, or if any person with intent to beat and defraud any street railway company, or any person operating a street railroad, shall get on and ride in or on any street car and leave same without paying or depositing such fare as aforesaid, in each and every such case the person offending shall be fined not less than $5 nor more than $10, and upon a trial for a violation of the last clause of this section, for the purpose of showing intent (but for no other purpose), it shall be competent to repeat similar acts by the accused.

SEC. 1296. *Penalty.*—SECTION 86. Any person convicted of a violation of this ordinance, or of any part thereof, shall be subject to a fine of not less than $1, nor more than $100, and be imprisoned until such fine and costs are paid, but such imprisonment shall in no case exceed thirty days.

CHAPTER II.

Street Railway Franchises.

SUBDIVISION I.

An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines.

No. 63, passed December 10, 1866. [Chap. 53, R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SECTION 1297. *Franchise.*—SECTION 1. That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and on such streets in the City of Des
2234 Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.

SEC. 1298. *Animal Power Only.*—SECTION 2. The cars to be used upon such tracks shall be operated with animal power only, and

shall not connect with any other railway, on which power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

SEC. 1299. *Cars and Carriages.*—SECTION 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities; *provided*, said company shall at all times have the right to use their track for transporting iron, ties, and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said company.

SEC. 1300. *Established Grades.*—SECTION 4. The track of such railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the City has or may establish such grades; where the streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets; *provided*, that they may raise the same to the grade when the City shall grade the same or any part thereof, and in case said City shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the track; *provided*, said company shall plank the space between the tracks at each principal street crossing whenever required by the Mayor.

SEC. 1301. *Damages.*—SECTION 5. The said City of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

SEC. 1302. *Where Laid.*—SECTION 6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to
2235 so lay them, and except where a double track is contemplated in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley, as provided for in Section 1, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley; *provided*, however, that if said company shall have its depots, stations, stables or car houses on any lot fronting on such alleys they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car houses.

SEC. 1303. *Rates.*—SECTION 7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five years after the completion of the first mile of track and thereafter shall not exceed the rate of six cents for any one route.

SEC. 1304. *Penalty*—SECTION 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said City, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said railway cars, by placing, driving or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle, or other obstacle in, upon, across, along, or near the track of said railway, or either of them, after being notified by the driver or conductor, by the ringing of the car bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the Police Judge of said City, be fined in any sum not less than $5 nor more than $50.

SEC. 1305. *Limitations.*—SECTION 9. [As amended by Ordinance 131, passed February 5, 1872.] This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the 1st day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the 1st day of January, A. D. 1872, unless the City Council of said City shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time
2236 herein specified, all rights and privileges herein granted shall be forfeited, and revert to the City of Des Moines. *Provided,* that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of such given number of miles of said company. *Provided,* that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the City of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order, and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall pay all expenses that may accrue by reason of such suit or suits, and unless such notices the time of the continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

SEC. 1306. *Thirty Years.*—SECTION 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

SEC. 1307. *Fair Grounds.*—SECTION 11. After the year A. D. 1875, whenever there may be any fair grounds, or any other place of public resort in or near the suburbs of the City, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the City, or with some other route running into some central part of the City, and it may be deemed for the public interest to have a street railway built to or near such fair grounds or other place of public resort, the City Council may, by a two-thirds vote, require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such route within one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the
2237 same time, and run the same upon the same terms as the company to which this grant is made.

SEC. 1308. *City Taxes.*—SECTION 12. Said company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be subscribed and sworn to by the secretary and treasurer of the company, and there shall be levied on such net receipts a tax of three per cent. for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes, and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the City are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be such net receipts and the city tax shall be levied thereupon as above provided. And the tax hereinabove provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof in the same, shall not be taxed in any other manner for any municipal purpose.

SEC. 1309. *Rules and Regulations.*—SECTION 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

First. No car shall be run at a greater rate of speed than six miles an hour.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near at stations.

Fourth. No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street or to take on or to leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to
2238 persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

SEC. 1310. *Acceptance.*—SECTION 14. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted, this ordinance shall operate as a contract between the City and said company, and upon failure to file such acceptance as aforesaid then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever.

An ordinance amending Ordinance No. 63 (being Chapter 53, Revised Ordinances of 1889), entitled, an ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, passed December 10, 1866.

No. 492, passed March 8, 1890.

Be it ordained by the City Council of the City of Des Moines:

SEC. 1311. *Electricity.*—SECTION 1. That Section 2 of said ordinance be and the same is amended so as to read as follows, to-wit:

SECTION 2. The cars to be used upon the railway tracks, constructed under and in pursuance of the ordinance or acquired by said company or its assigns, or that hereafter may be con-
2239 structed or acquired, shall be operated by animal power or by electricity or other practical motor power. *Provided,* that hereafter in laying its tracks on parallel streets the same shall not be laid nearer together than two blocks, unless the City Council shall consent thereto, nor shall any track of said company's road as now laid, be removed without the consent of the City Council; and *provided* further, that no more than two tracks shall be laid on any street, and when tracks are laid they shall be laid so as to leave as much room on either side thereof as practical, and *provided* further, that this amendment shall in no way be construed as authorizing the use of steam motors on said roads for propelling said company's cars, nor shall said company or its assigns, allow the use of its tracks for any other purpose than that of legitimate street railway traffic.

SEC. 1312. *Rates.*—SECTION 2. That Section 7 of said ordinance be and the same is hereby amended so as to read as follows:

SECTION 7. The rate of fare upon any one line or route of said company's railway, shall not exceed 5c.; *provided,* however, that children under five years, who are accompanied by their parents or nurse, shall be carried free.

SEC. 1313. *Rules Changed.*—SECTION 3. That rule first of Section 13 of said ordinance shall be amended so as to read as follows:

First. No cars shall run at a greater rate of speed within the business portion of said City than eight miles an hour, nor shall the same be run in any other portion of said City at a greater rate of speed than twelve miles an hour.

Rule eleventh of said Section 13 shall be amended by adding thereto the following words: "And said company shall also accept such other reasonable rules and regulations for the construction and operation of its roads as the safety and convenience of the people may require."

SEC. 1314. *Acceptance.*—SECTION 4. This ordinance, when accepted by the Des Moines Street Railroad Company, shall be and become a part of the contract between it as the assignee of the Des Moines Street Railway Company and the City of Des Moines; *provided,* the same shall be accepted in thirty days from the passage thereof.

SEC. 1315. *Publication.*—SECTION 5. This ordinance shall take effect from and after its publication as required by law; *provided,* that such publication shall be at the expense of said railroad company.

2240 SUBDIVISION II.

An ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct, maintain and operate by electric or other motive power, other than animal or steam power, on any street, street railroads in the City of Des Moines, and defining the powers and duties of said company.

No. 399, passed December 20, 1887. [Chap. 57 R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SECTION 1316. *Franchise.*—SECTION 1. That consent, permission and authority is hereby given and granted to and vested in the Des Moines Broad Gauge Street Railway Company, and its successors and assigns, to construct, maintain, equip and operate for the term of twenty-five years, upon the conditions hereinafter stated, with electric or other practical motor power, other than animal or steam power, on any street, single or double track standard or broad gauge street railway tracks, four feet, eight and one-half inches wide, along and over the streets, alleys, viaducts and bridges of and within the City of Des Moines, hereinafter designated; and such other streets and alleys as said company may hereafter select with the consent and approval of the said City; and to construct, maintain and use in connection therewith all necessary and convenient tracks for turn-outs, side-tracks and switches, and all necessary and convenient apparatus and appliances required for the proper use of such motive power to enable said company to comply with the requirements of this ordinance; and upon such alleys only fronting on which said company shall have depots, car barns or electric or other machinery. And in constructing, maintaining and operating said railway, said company shall have the right to intersect and cross the tracks of any street or other railway company.

SEC. 1317 *Electric Power.*—SECTION 2. Consent, permission and authority is hereby given and granted to the Des Moines Broad Gauge Street Railway Company, its successors and assigns, to maintain as now constructed, subject to the provisions of this ordinance, all track of its railway as now laid in the City of Des Moines, and is granted permission and authority to itself, its successors and assigns, to equip and operate its cars upon said lines of street railway with electric or other motive power, other than animal or steam power, on any street, but such equipment and operation shall be subject to the provisions of this ordinance.

SEC. 1318. *Streets Designated.*—SECTION 3. The streets and parts of streets herein specifically referred to are as follows:

Commencing at the east corporation line of Grand avenue,
2241 running west on said avenue to East Ninth street, thence south on Ninth street to Locust street, thence west on Locust street to West Fourth street, thence south on said Fourth street to Court avenue, thence west on Court avenue to West Fifth street, thence north on West Fifth street to Mulberry street, thence west on Mulberry street to Seventh street, thence north on Seventh street

to Walnut street, thence west on Walnut street to Twelfth street, thence north on Twelfth street to Grand avenue, thence west on Grand avenue on the north side of the center of the avenue to Fifteenth street, thence north on Fifteenth street to Linden street, thence west on Linden street to Sixteenth street, thence north on Sixteenth street to High street, thence west on High street to Seventeenth street, thence north on Seventeenth street to Center street, thence west on Center street to Eighteenth street, thence north on Eighteenth street to Crocker street, thence west on Crocker street to Cottage Grove avenue, thence along Cottage Grove avenue to Twenty-first street, thence north on Twenty-first street to Atkins street, thence west on Atkins street to Twenty-fourth street, thence north on Twenty-fourth street to North street, thence west on North street to Drake University.

Also north on West Fourth street from Locust to Center street, thence west on Center to Fourth street, thence north on Fourth to School street, thence west on School street to Sixth avenue, thence north on Sixth avenue to the north corporation line of said City; but on West Fourth street, between Locust and Center streets, there shall not be laid to exceed one track, and one switch between Court avenue and Center street not exceeding 120 feet in length.

Also north on East Fifth street from Locust street to Grand avenue, thence east on Grand avenue from Fifth to Sixth street, thence north on Sixth street from Grand avenue to Maple street, thence east on Maple street from Sixth street to Pennsylvania avenue, thence north on Pennsylvania avenue from Maple street to Filmore street, thence east on Filmore street to Ninth street, thence north on Ninth street from Filmore street to the north corporation line of said City.

Also all other streets or parts of streets heretofore granted to said railway company by ordinance or resolution of the City Council of said City; *provided*, this grant shall not be held to authorize the laying of more than one track and the necessary turn-outs and switches along any street upon and along which there shall be at the time of laying such single track another line of parallel street railroad constructed and in actual operation under and in accordance with the ordinances of said City.

SEC. 1319. *Kind of Cars.*—The cars to be used upon such tracks shall be of the best style and class used in other first-class
2242 cities of the country, and shall be operated by electric or other practical motive power only, and not by animal or steam power on any street. The tracks shall not connect with any railway on which animal or steam power is used, and no railway car or carriage used upon any railway operated by animal or steam power shall be used upon any of said tracks; and said cars and tracks shall be used for the purpose of transporting passengers and their ordinary baggage only. *Provided*, said company shall at all times have the right to use said tracks for transporting materials to be used by it in constructing, repairing and operating its road, and may also haul the cars used by it upon its extensions outside of the City limits into and through the City, and the street cars used by

other companies within the City of the same gauge as the cars of said company.

SEC. 1320. *Construction.*—SECTION 5. In the construction of its track a tram rail only shall be used, the width of which shall be five inches from the outside to outside; the width of the tram shall be three inches horizontal; the height along the wagon edge, or from the run to the highest part of the rail, shall not be more than seven-eighths of an inch.

SEC. 1321. *Street Grades.*—SECTION 6. The track shall be laid so as to conform to the established grade of any street on which the road may be built, whenever the City has or hereafter shall establish such grade. When the streets are not graded, said company may lay its tracks so as to conform to the surface of such streets, but the same shall be made to conform to such grade whenever the City shall grade such streets, or any part thereof, and in case the City at any time shall pave or otherwise improve the surface of any street along which said railway may run, said company shall at its own expense pave or otherwise improve the space between the rails of their track so that it shall substantially correspond with the improvement of the street outside of the rails and track.

SEC. 1322. *Damages.*—SECTION 7. The said City of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breaking of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or for the improvement or repairs of any street, unless there be unreasonable delay in making such repairs.

SEC. 1323. *How Laid.*—SECTION 8. Upon all street and alleys where said company is granted a permission to lay its tracks, along which no other parallel railroad track is laid, the tracks of said company shall be laid in the center of the streets in all cases
2243 where it is practicable to so lay them; and except where a double track is contemplated, in such case the tracks may be laid at such distance from the center of the streets as will make the center point between the two tracks the center of the street, and there shall be no greater space between the tracks than reasonably necessary for the cars to pass, and said tracks shall not be laid within twelve feet of the curb-line, unless permission be first obtained from the City Council, upon any street in any case where it is practicable to be avoided, and where any line of railway along and upon any such alleys, as provided for in Section 1, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alleys; *provided*, however, that if said company shall have its depot, stations, stables, or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks from such alleys into such depots, stations, stables or car houses.

SEC. 1324. *Other Railways.*—SECTION 9. In all cases where said company shall desire to construct a line of street railway parallel to the line of any other street railway previously laid, and being

used on such street or streets, said company may lay its tracks as near the center of the street as practicable, without interfering with the practical operation of the line of railroad then in operation along such street.

SEC. 1325. *Rates.*—SECTION 10. The rate of fare shall not exceed 5c. for each passenger on any one route of the company, from the extreme north end to the extreme south end of said line, and from the extreme east end to the extreme west end of the routes herein granted.

SEC. 1326. *Use of Tracks.*—SECTION 11. The cars of said company shall be entitled to the track; in all cases when a team or vehicle shall be met or overtaken upon any of the street railways in said City of this company, such team or vehicle shall give way to such car; nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said railway cars, by placing, driving or stopping, or causing to be placed or driven in a slow pace, or stopping any team or vehicle in, upon, along, across or near the track of said railway, after being notified by the driver or conductor, by the ringing of the car bell or otherwise; and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the Police Judge of this City, be fined in any sum not less than $5, nor more than $50.

SEC. 1327. *Rights and Privileges.*—SECTION 12. This charter is granted upon, and the rights and privileges herein conferred are subject to the following conditions, to-wit:

2244 SEC. 1328. *Construction.*—SECTION 13. In the construction of their railway upon all bridges and viaducts over which the same may run, the company shall so construct the same that the top surface of the rails shall be on a level with the surface of the floor of the bridge or viaduct, and on all paved streets the top surface of the rail shall be on a level with the surface of the pavement.

SEC. 1329. *Rules.*—SECTION 14. The cars or carriages of said company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

First. No car shall be run upon a greater average rate of speed, including stoppages to take on and let off passengers, than eight miles an hour in the business part of the City, and twelve miles an hour in the residence portions thereof, nor less than an average of five miles an hour in the business portion of the City, and eight miles an hour in the residence portions thereof.

Second. While cars are turning corners from one street to another they shall not be moved to exceed five miles an hour.

Third. Cars moving in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity, accident, or when near stations, unless attached and propelled together.

Fourth. No car shall be left standing upon the street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk, nor in front

of any intersecting street, except to prevent collision, or to avoid danger to persons in the street, or to take on or to put off passengers.

Sixth. The conductors and drivers employed by said company shall use all reasonable diligence and care to prevent injury to persons, and upon appearance of danger to any one on or near the tracks, the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons or other vehicles and persons.

Eighth. The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross
2245 streets, and they shall observe the same rule when nearing the track of any railway company, other than a street railway company.

Tenth. No car shall remain standing at any of the stations more than ten minutes, except at each end of the lines, and at stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time; and the cars after sunset shall be provided with lights and signal lights.

Eleventh. Cars shall start from both ends of any line as early as six o'clock A. M. and run continuously as late as twelve o'clock, midnight; from six to nine o'clock A. M. and from nine o'clock P. M. to midnight, cars shall run at intervals of not more than ten minutes, and from nine o'clock A. M. until nine o'clock P. M. cars shall run at intervals of not more than five minutes.

SEC. 1330. *Other Street Railways.*—SECTION 15. Whenever the City Council shall by ordinance grant to any other street railway company the right to lay its tracks along and upon any street, upon which this company shall have laid its track or tracks, and shall then be operating its line, the City Council may by resolution require the said Des Moines Broad Gauge Street Railway Company and its successors and assigns, at the expense of such other street railway company, to move its track (if but one) to one side of the center of the street, so that the new track may be so laid that the center of the street shall be the center of the space between the said tracks; if said company shall have two tracks on such street, then they shall be so moved as to permit the laying of the new track in such position that the space between the sidewalks and the track on each side of the street shall be equal. Should the said company fail or refuse to move its track or tracks as above provided, when notified so to do by resolution of the City Council, the City Council may cause the said track or tracks to be moved at the expense of said company.

SEC. 1331. *Use of Tracks.*—SECTION 16. Whenever another street railway company, duly authorized by the City Council, shall desire to operate its line, for a distance of not more than two blocks, along and upon any street upon which the said Des Moines Broad Gauge

Street Railway Company shall have laid its track and shall then be operating its line, the City Council may require such new company to run its cars upon and along the said track or tracks for said distance, and the said Des Moines Broad Gauge Street Railway Company shall grant such other company the right to use its track or tracks for said distance upon payment by such other company of a reasonable compensation, to be agreed upon by the said companies, if possible; but if the said companies cannot agree then the compensation shall be fixed by three persons, one to be chosen by each company and the two so chosen to choose a third; *provided,*
2246 such other company shall not use such track or tracks so as to interfere with or unnecessarily obstruct the operation of the cars of the company owning such line, according to their schedule time of running their cars thereon.

SEC. 1332. *Failure to Use.*—SECTION 17. A failure to use any track or tracks, and run cars thereon, on any street or part of a street, provided in rule eleven of this ordinance, for a period of thirty days, unless unavoidably prevented or pending litigation involving the right of said company to operate its road, shall be deemed an abandonment of such street or part of street by said company and the City Council may by resolution declare such street or part of street abandoned, and require said company to remove its tracks from any such street or part of street, and upon failure or refusal of the said company to so remove its tracks, when notified so to do, the City Council may cause the same to be removed at the expense of said company.

SEC. 1333. *Time Limit.*—SECTION 18. The said company shall commence operating at least one car on its line by electric or other motive power, except animal and steam power, on the streets within twelve months after its acceptance of this ordinance, and shall have at least six cars so operating within two years from such acceptance, and operate the same thereafter upon the schedule time prescribed by rule eleven of this ordinance; and, *provided,* that in case said company shall be prevented from complying with the provision of this section, by litigation in any court of justice, the time thus prevented shall not be counted against the aforesaid Des Moines Broad Gauge Street Railway Company, but shall be regarded as an extension of time in favor of the last named street railway company, its successors or assigns.

SEC. 1334. *Rules.*—SECTION 19. The City Council reserves the right to adopt such other reasonable rules and regulations from time to time and to compel compliance therewith.

SEC. 1335. *Damages.*—SECTION 20. In any litigation arising out of the grant herein given, the City shall not be liable for any costs or damages growing out of such litigation.

SEC. 1336. *Per Cent of Earnings.*—SECTION 21. After the expiration of ten years from the passage of this ordinance the said company shall pay annually to the City five per cent of its net earnings as consideration for the rights and privileges herein granted, but nothing herein shall be construed as exempting said company from taxation the same as other property subject to taxation.

SEC. 1337. *Acceptance.*—SECTION 22. Within thirty days after the publication of this ordinance said company shall file with
2247 the City Clerk a written acceptance of the grant above made with the condition, regulations and limitations above expressed, signed by the president and secretary of said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchise whatever.

SEC. 1338. *Other Company.*—SECTION 23. Nothing in this grant contained shall be construed as an interference on the part of the Council with the exclusive right of the Des Moines Street Railway Company to construct and operate by animal power street railways upon the streets of Des Moines, under such reasonable police and equitable control as may be prescribed by the Council, and in accordance with the decree of the Supreme Court of Iowa, entered December 20, 1887, in the case of said company against the City of Des Moines, the City Council having by resolution adopted, December 19, 1887, determined that the lines of the Des Moines Street Railway Company, now constructed or that may be constructed or extended hereafter and operated by animal power, do not furnish and will not furnish upon the streets designated in this ordinance, or to the public, such street car service as is reasonably required by said City on said street.

SUBDIVISION III.

Street Railways—Consolidation Resolutions.

Adopted September 5, 1889. [Pages 532 to 534, R. O. 1889.]

SECTION 1339. Whereas, Negotiations are now pending for the consolidation of the different street railroad companies in the City of Des Moines, and it is believed that the general welfare of the City will be promoted by such consolidation; therefore, as an inducement to such consolidation, be it

Resolved, That in event of such consolidation taking place between the Des Moines Street Railroad Company, the Des Moines Electric Street Railway Company, and the Des Moines-Sevastopol Street Railway Company so that said consolidated roads shall be operated under one management, the City of Des Moines will dismiss its suit against the Des Moines Street Railroad Company to cancel its charter, on condition that the Des Moines Street Railroad Company will dismiss its suit against the City of Des Moines and the Des Moines Broad Gauge Street Railway Company for damages growing out of the granting of certain franchises to the Des Moines Broad Gauge Street Railway Company and the Des Moines Electric Railway Company, and in such event the matters in controversy between said several parties in said suit shall be regarded as fully and finally settled. *Provided*, that the company owning or operating such
2248 consolidated roads shall accept such modification of existing franchises as will require it within a reasonable time, not ex-

ceeding twelve months, to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart, nor shall any tracks now being operated be taken up unless by permission of the Council; and, *provided*, further, that not more than two tracks shall be laid upon any street, and whenever tracks are laid they shall be laid so as to leave as much room on either side as is practicable, and such company shall also accept such other reasonable rules and regulations relating to the construction and operation of the road as the safety and convenience of the people may require.

SEC. 1340. Whereas, Negotiations are now pending for a consolidation of the different street railway companies of this City, and it is believed that the general welfare of the City will be promoted by such consolidation, therefore, as an inducement to such consolidation, be it

Resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines-Sevastopol Street Railway Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railways, now or hereafter constructed, by electricity or other practical motor power. This resolution shall not, however, be construed as authorizing the use of steam motors for propelling said company's cars.

To the Honorable Mayor and City Council of Des Moines, Iowa:

SEC. 1341. *Acceptance.* Whereas, on the 5th day of September, 1889, your honorable body passed certain resolutions concerning the consolidation of certain street railway lines, and granting certain rights and privileges to the consolidated company, and exacting certain duties in consideration thereof, and,

Whereas, Said street railway lines are to be consolidated under the corporate name of Des Moines Street Railroad Company, and immediately upon the passage and approval of said resolutions contracts were entered into between said companies to that end, and a part of the purchase price for said property was thereupon paid.

Now, therefore, the undersigned, the said consolidated railroad company, upon the condition that said consolidation be fully effectuated, as in said resolutions stated, hereby accepts of the provisions and requirements of said resolutions and each of them and will proceed accordingly.

Des Moines Street Railroad Company, by W. M. McCain, President; Frank A. Sherman, Secretary.

Filed September 10, 1889.

2249 SUBDIVISION IV.

An ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along and upon a certain street, and to cross certain streets in the City of Des Moines.

No. 426, passed May 14, 1888. [Chap. 61, R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SECTION 1342. *Franchise.*—SECTION 1. That there is hereby granted to the Des Moines Rapid Transit Company the right to build, construct and operate its railway along and upon the thirty-three foot street running east and west between West & Burton's and Cottage Hill additions to Fort Des Moines, now included in the corporate limits of the City of Des Moines, and said company shall have a right to lay down and maintain a single or double track along and upon said street, with all switches and turn-outs necessary in operating its said road. And said company shall have the further right to cross the following streets of said City, to-wit: Nineteenth street, Twenty-first street and Western avenue.

SEC. 1343. *Street Grades.*—SECTION 2. Whenever said street shall be paved or improved at the established grade thereon, said Des Moines Rapid Transit Company will bring that part of such street covered by its tracks to such grade, and will pave and maintain in width three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets crossed by said railway within the corporate limits of the City.

SEC. 1344. *Use of Street.*—SECTION 3. That if the said Rapid Transit Company shall procure a street thirty-three and one-third feet wide, to be opened up on each side of and abutting on said street, it shall have the right to appropriate a strip of said street to running east and west between said West & Burton's and Cottage Hill additions, ten feet wide on each side of the center line thereof for its exclusive right-of-way, and it shall not in such case be compelled to pave the said twenty feet of right-of-way only at the street crossings. But said company shall curb its right-of-way when said street is ordered to be paved.

SEC. 1345. *Restrictions.*—SECTION 4. The right-of-way herein granted is upon the express terms and conditions that the said Des Moines Rapid Transit Company shall never use said street or any part thereof for general railroad purposes; nor shall said company grant or allow any other railway company to use its track or right-of-way for general railway purposes.

SEC. 1346. *Motor Power.*—SECTION 5. That said company
2250 shall have the right to propel its cars on its railway by a steam or electric motor, but the speed thereof shall not exceed eight miles per hour within the corporate limits of said City. *Pro-*

vided, that in the construction of said railway an ordinary railroad engine may be used.

SEC. 1347. *Paving and Curbing.*—SECTION 6. If the said Rapid Transit Company shall at any time procure a street to be opened up on either or both sides of its right-of-way from the west line of West & Burton's addition to Western avenue and the City of Des Moines shall order the same paved then, and in that case, said company shall put in and maintain curbing on each side of its right-of-way on the line of said street or streets.

SEC. 1348. *Limits.*—SECTION 7. This ordinance shall not be construed as granting said Des Moines Rapid Transit Company the right to lay down or maintain its tracks along, upon or cross any other street or streets than the ones named herein.

SEC. 1349. *Fare.*—SECTION 8. The fare to be charged by said Des Moines Rapid Transit Company shall not exceed five cents within the corporate limits of said City, for one trip or over one route.

SEC. 1350. *Damages.*—SECTION 9. Said Des Moines Rapid Transit Company shall be liable for any and all damages resulting to persons or property resulting from the construction, maintaining and operating said railway.

SEC. 1351. *Completion.*—SECTION 10. The said Des Moines Rapid Transit Company hereby agrees to complete said road and to have cars running thereon on or before the first day of June, A. D. 1889, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited.

An ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railway along Grand avenue in the City of Des Moines, Iowa, from the point where its railway as now projected will intersect said avenue, between West Seventeenth and Nineteenth streets, to the intersection of East Fifth street with said Grand avenue.

No. 440, passed August 21, 1888. [Chap. 62, R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SEC. 1352. *Franchise.*—SECTION 1. As amended by Ordinance No. 464, passed March 12, 1889. [Chap. 66, R. O. 1889.] That there be and is hereby granted to the Des Moines Rapid Transit Company the right to build or acquire by lease or otherwise, and main-
2251 tain and operate a single or double track street railway, with all necessary switches and turn-outs, along and over Grand avenue, in the City of Des Moines, from a point on said avenue between West Seventeenth street and Nineteenth street, where said company's road as now constructed intersects the said street, to a point of intersection of East Fifth street with said avenue, and along and over the following other streets and parts of streets, to-wit: West Fifteenth street from Grand avenue to Walnut street, thence east on Walnut street to West Eighth street, thence south on West Eighth street to Mulberry street, thence east on Mulberry street to

West Fifth street, thence south on West Fifth street to Court avenue thence east on Court avenue to East Sixth street, thence north on East Sixth street to Walnut street, thence east on Walnut street to the corporation line; East Sixteenth street from Capital avenue south to Brooks street, thence east on Brooks street to the corporation line East Fourteenth street from Walnut street to the north corporation line; East Seventh street from Des Moines river to Locust street thence crossing Locust street to Pennsylvania avenue, thence on Pennsylvania avenue to Lyon street, thence east on Lyon street to East Eighteenth street, thence north on Eighteenth street to the corporation line; East Nineteenth street from Walnut street to Scott street, thence east on Scott street to the corporation line; West Twenty-fourth street from the line of said company's railway to the north corporation line; West Seventh street from north corporation line to south corporation line. And the said company is hereby authorized to propel its cars thereon by steam applied by what is known as the cable system, or by the Patton motor system, or by electricity, or by such other power as may hereafter be approved by ordinance of the City Council. *Provided*, however, that if electricity is used it shall be applied by a storage battery or through underground conduits, and the power herein granted to operate its said road with electricity or other power shall be exclusive only as to Grand avenue for the period of ten years from the acceptance of this ordinance. *Provided*, however, that this grant shall in no way abridge or interfere with the vested rights of any other street railway company now occupying any of said streets or parts of streets, if any there be, and this company is authorized to run its cars along and over the track or tracks of any other street railway in the City of Des Moines, and to haul cars of any such company on and over its tracks; *provided*, such other company shall consent thereto, and said Rapid Transit Company shall not be required to run its cars over its line oftener than once every thirty minutes; *provided*, it shall run the same on schedule time.

SEC. 1353. *Limit.*—SECTION 2. That this company or its assigns shall commence work upon its road within six months from
2252 the passage of this ordinance and construct or procure by lease or otherwise two miles of its track within one year from such date, and shall construct or procure one mile of track each year thereafter, until it shall have occupied the several streets along which the right-of-way is herein granted to it, and a failure so to do shall forfeit the rights herein granted, over and along the streets or parts of streets not thus occupied.

SEC. 1354. *Two Tracks.*—SECTION 3. The tracks of said company shall be laid in the center of said street except where a double track is contemplated, or when some other company is or shall be hereafter authorized to lay a track on the same street, and in either of said last named cases the tracks shall be laid at such distance from center of said street as that the center of said street shall be the same distance from the outer rail of each of said tracks, which distance shall be fixed and determined by the City Engineer, and, *provided*, further, that if any other street railway company shall hereafter be

granted the right to lay its track upon any part of said street upon which said Rapid Transit Railway Company, or its assigns, shall have a track or tracks of its railroad then laid or acquired, it shall, on demand of said other company, remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built. *Provided*, however, that before it shall be required to make such removal the company desiring the same shall pay or tender the cost of making such change and if upon such demand and tender of the cost of such removal the same shall not be made within thirty days then such track shall be removed and relaid by the City Marshal, under the supervision of the City Engineer, at the cost of the company desiring such change. *Provided*, however, that there shall not be more than two tracks of any railway laid on any part of said street except for the necessary switches and turn-outs, nor shall said tracks be laid within twelve feet of the sidewalk on said street except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car houses and shops.

SEC. 1355. *Noiseless Motors.*—SECTION 4. The cars to be used upon such tracks by said company shall be of the best style and class used in other first-class cities and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used thereon for propelling the cars of said company shall be of the most approved make and pattern and shall be what are termed noiseless motors.

SEC. 1356. *Water and Gas Pipes.*—SECTION 5. This grant shall be subject to all the rights of the water and gas companies and street railway companies, under grants heretofore made to them by the City of Des Moines, and said City shall in no way be held
2253 liable to said company, or its assigns, for any outlay or damage caused to said Rapid Transit Railway Company by the construction or repairing of sewers, repairing or building of bridges, grading and repairing the streets on which such railroad track is laid; *provided*, the same is done in a careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 1357. *Rates.*—SECTION 6. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the City limits on any one route; *provided*, that such passage shall be continuous; *provided*, children under six years shall go free if accompanied by their parents.

SEC. 1358. *Right of Track.*—SECTION 7. The cars of said company shall be entitled to the track; in all cases when a team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the car bell or otherwise, and should the person or persons in charge of such team or vehicle wilfully violate the provisions of this section they shall, upon conviction thereof be-

fore the Police Judge of this City, be fined not less than $5, nor more than $50.

SEC. 1359. *Construction.*—SECTION 8. In the construction of its railway upon or over all bridges or viaducts, upon the street or streets along which the same may run, said company shall so construct the same that the top surface of the rails of said railway shall be on the level with the surface of the floor of the bridge, and on all paved streets the top surface of the rails shall be on the level with the surface of the paving, and in case the City at any time shall pave or otherwise improve the surface of any street along which said railway may run, said parties or their assigns, shall at their own expense pave or otherwise improve the space between the rails of their tracks, that it shall substantially correspond with the improvement of the street outside of the rails and track. When the tracks are laid upon a street already paved, the said parties or their assings, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails, and said parties or their assigns, shall plank the space between the track at each principal crossing whenever required by the City Council and to its satisfaction, and they shall restore all streets, whether paved or not, to as good condition as before the laying down of their tracks.

SEC. 1360. *Abandonment.*—SECTION 9. A failure from any fault of said company to use any track or tracks so constructed and
2254 run cars thereon, on any street or part of street, for a period of thirty days, shall be deemed the abandonment of such street or part of street by said company or its assigns, and the City Council may by resolution declare such street or part of street abandoned, and require said company or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove its track or tracks when notified to do so, the City Council may cause the same to be removed at the expense of said company or its assigns.

SEC. 1361. *Damages.*—SECTION 10. In constructing, repairing and operating said street railway said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property and shall at all times respond to the City of Des Moines for, and save it harmless from, all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers or employés in the construction, re-construction, repairing or operating of said street railway, or in paving, repaving or repairing of any street or by reason of any and every act done under the provisions of this ordinance.

SEC. 1362. *Time Limit.*—SECTION 11. The said company, or its assigns, shall commence work on their line within five months from the acceptance of the terms and conditions of this ordinance, and shall have its track completed and cars running thereon within eighteen months from the date of said acceptance.

SEC. 1363. *Arbitration.*—SECTION 12. The City of Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches, turn-

outs and turn-tables of said road to be constructed under this ordinance, on said part of said streets, for the distance of two blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested; and, in case of disagreement, then the same to be settled by arbitrators; one chosen by each of said companies, and the two chosen to select the third, and the persons thus chosen shall decide upon the terms and what would be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

SEC. 1364. *Construction.*—SECTION 13. The slot rails used by said company in the construction and maintenance of said road, if it shall be constructed as a cable railroad, shall be constructed and placed so that the slot between said rails for the accommodation of the grip arm shall not exceed in width three-fourths of an inch, and shall be so constructed as to present a flat and even surface and the upper surface of said slot rails adjoining said slot shall not be made beveling, but shall be made flat and square so as to
2255 prevent the wheels of carriages and other vehicles and the calks of shoes on horses or other animals from dropping into and catching on said slot while passing along or over the same.

SEC. 1365. *Rules.*—SECTION 14. The cars or carriages operated by said company or its assigns, shall be run along and upon said railway in conformity with the following rules and regulations:

First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portion of the City, nor more than ten miles an hour elsewhere.

Second. While the cars are turning corners from one street to another, they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing on any street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop upon or over a cross-walk at intersecting streets, except to prevent a collision or to avoid danger to persons in the street, or to take on or leave off passengers.

Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such crossings, and they shall observe the same rule when nearing a track of any railway other than a street railway.

Seventh. Cars after sunset shall be provided with signal lights.

Eighth. Cars shall start from both ends of said line as early as six o'clock A. M. and run continuously as late as twelve o'clock midnight. From six to nine o'clock A. M. and from nine o'clock P. M. to midnight, cars shall run at intervals of not more than ten minutes, and from nine o'clock A. M. until nine o'clock P. M. cars shall run at intervals of not more than five minutes.

SEC. 1366. *Damages.*—SECTION 15. The rights and privileges

hereby conferred upon the company, are upon the express terms and conditions that any judgment that may hereafter be obtained against said company or assigns, for any injury to any person or property on account of the construction or operation of said railway, shall be a lien upon all the property of said company, and such lien
2256 shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

SEC. 1367. *Rules and Regulations.*—SECTION 16. That the City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 1368. *Acceptance.*—SECTION 17. Within sixty days from the passage of this ordinance, said company shall file with the City Clerk a written acceptance of the grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company.

SUBDIVISION V.

An ordinance granting to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway along and upon a certain street and to cross certain streets in the City of Des Moines.

No. 429, passed May 16, 1888. [Chap. 59, R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SECTION 1369. *Franchise.*—SECTION 1. That there is hereby granted to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway with a single track along and upon the east fifteen feet of First street, in said City, from Center street to a point two hundred feet north of north line of Crocker street, and across such other streets in said City as may be necessary in the construction of its said road.

SEC. 1370. *Street Grade.*—SECTION 2. That the right-of-way granted in Section 1 is upon the express condition that said Des Moines Belt Line Railway Company shall grade said street occupied by them at least twenty-five feet west of the west rail of their track to such grade as may be prescribed by the City Council.

SEC. 1371. *Paving.*—SECTION 3. Whenever said street shall be paved or improved at the established grade thereon, said Des Moines Belt Line Railway Company shall bring that part of such street covered by its tracks to such grades, and shall pave and maintain three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets, whether paved or not paved, crossed by said railway within the corporation limits of said City, and shall build all necessary culverts for drainage of water wherever necessary.

SEC. 1372. *Right-of-way.*—SECTION 4. The right-of-way herein granted is upon the express terms and conditions that the said Des Moines Belt Line Railway Company shall never use said
2257 street, or any part thereof, for general railroad purposes; nor shall said company grant or allow any other railway

company to use its track for general railway purposes along or upon the street named. It is herein provided by the express provisions of this ordinance that the gauge of said Des Moines Belt Line Railway Company shall be four feet eight and one-half inches, and that the center of the rails of said railway shall not be west of the center of the right-of-way on said street herein granted.

SEC. 1373. *Power.*—SECTION 5. That said company shall have the right to propel its cars on its railway by steam or electric motor, but the speed thereof shall not exceed eight miles per hour upon any streets herein named within the corporate limits of said City; *provided*, that in constructing said road said company may use an ordinary railway locomotive.

SEC. 1374. *Streets Named.*—SECTION 6. This ordinance shall not be construed as granting said Des Moines Belt Line Railway Company the right to lay down or maintain its track lengthwise upon any other street than the one named herein.

SEC. 1375. *Damages.*—SECTION 7. Said Des Moines Belt Line Railway Company shall be liable for any and all damages resulting to persons or property on account of the construction, maintaining and operating said railway, and to hold the City of Des Moines forever harmless from any and all damages that may result from granting the rights and privileges herein conferred. And said railway company shall be subject in the operation of its railway upon said street to such reasonable regulations as the Council may from time to time prescribe.

SEC. 1376. *Retaining Walls.*—SECTION 8. Said Des Moines Belt Line Railway Company shall, while constructing and maintaining its railway, put up and erect at its own cost and expense, retaining walls on the west line of said street, at such points and places along such line as may be designated by the City Engineer and City Council, for the purpose of protecting property abutting on said street, the walls to be built and constructed with such material and in such manner as may be designated and directed by the City Engineer and City Council or Board of Public Works (in event of a Board of Public Works being established and in existence at the time said word is done), the work to be done under their supervision and direction. The walls so erected to be kept at all times in good repair by said railway company. In no event shall said walls be built, save and except upon the west line of said street.

SEC. 1377. *Operation.*—SECTION 9. In the event of the Des Moines Belt Line Railway Company, its successors or assigns, shall as now or hereafter constituted or named and within five years from 2258 the passage of this ordinance or at any time thereafter, cease to exist or operate said railway then and in that event, and upon a failure to operate said road for a period of sixty days, all rights and privileges herein granted shall from the date of its nonexistence, or a failure to so operate, constitute a revocation of all the rights and privileges granted by this ordinance without further notice upon the part of the City, save and except that the revocation herein named shall not be absolute until this ordinance has been repealed by the City Council.

SEC. 1378. *Fare Charged.*—SECTION 10. The fare to be charged by said Des Moines Belt Line Railway Company shall not exceed five cents within the corporate limits of said City.

SEC. 1379. *Completion.*—SECTION 11. The said Des Moines Belt Line Railway Company hereby agrees to complete said road and to have cars running thereon on or before one year from the date of the passage of this ordinance, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited.

An ordinance granting to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets in the City of Des Moines.

No. 445, passed September 20, 1888. [Chap. 60 R. O. 1889.]

Be it ordained by the City Council of the City of Des Moines:

SEC. 1380. *Franchise.*—SECTION 1. That there be and is hereby granted to the Des Moines River Line Street Railway Company, its successors and assigns, the right to construct, maintain and operate a street railway, with single or double tracks and necessary turn-outs and switches, if a single track only is laid, along, over and upon the following streets in said City, to-wit: Upon Commercial street from the east end thereof to west Second street; upon Second street from the north line of Commercial street to Locust street; upon west Locust street from Second street to the east line of west Fourth street. And the said Des Moines River Line Street Railway Company is hereby authorized and empowered to use the tracks of the Des Moines Electric Railway Company, now laid between Second and Fourth streets on Locust street, upon making compensation therefor as provided in the ordinance granting said Electric Railway Company, or its grantor, the right to occupy the streets of said City. And the said Des Moines River Line Street Railway Company shall so run its cars upon the tracks of the said Electric Railway Company as not to unreasonably interfere with the use thereof by said last named company, and in no event shall any additional track be laid down upon Locust street between Second and Fourth streets by the Des Moines River Line Street Railway Company. And there
2259 shall not be laid on Second street between Commercial and Locust streets more than two tracks, and any company having the right to do so and desiring to occupy said portion of Second street after said two tracks are laid shall use such tracks upon making compensation as herein provided. And there shall not be laid on Second street, between Commercial and Locust streets, more than the two tracks now allowed to the Des Moines Electric Railway Company. *Provided*, however, that the said two tracks may be laid by the said Des Moines River Line Street Railway Company. *Provided*, further, that this section shall not take effect until the written consent of the Des Moines Electric Railway Company thereto is filed with the City Clerk.

SEC. 1381. *Power.*—SECTION 2. The said Des Moines River Line

Street Railway Company is hereby empowered and authorized to propel its cars by steam applied by the cable system, or what is known as noiseless steam motors. *Provided*, however, that this grant shall not be construed to infringe upon the vested rights of any other street railway company.

SEC. 1382. *Purpose.*—SECTION 3. The tracks of said street railway company shall be used for no other purpose than to render a street railway service, and shall not connect with any other railway; and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks. *Provided*, further, that this section shall not deprive other street railway cars from running over and along and upon said railway tracks; *provided*, that nothing in this section shall be so construed as to prevent this company from running the motors and passenger cars of the Des Moines Belt Line Railway Company over their line as long as the said Des Moines Belt Line Railway Company is not carrying on a regular commercial railway business.

SEC. 1383. *Fuel.*—SECTION 4. If a noiseless steam motor be used for propelling the cars of said street railway company, or the cars used upon its said tracks, the fuel used by such motors shall be either anthracite coal, coke or such other fuel as will produce no smoke in its consumption.

SEC. 1384. *Travel on Streets.*—SECTION 5. In the construction and operation of such company's railway along said streets said company shall exercise all reasonable care so as not unnecessarily to interfere with or impede the public travel on said streets. All new tracks laid by said company shall be laid so as to conform to the established grade of the City, if the surface of the street has been brought to grade, and if not, then the track may be laid so as to conform to the surface of the street, and shall be brought by the company to grade when the City brings its streets, or any part thereof, to grade free from expense to the City.

2260 SEC. 1385. *Construction.*—SECTION 6. The tracks of said company shall be laid in the center of said street except when a double track is contemplated or when some other company is or shall hereafter be authorized to lay a track on the same street, and in either of said last named cases the track shall be laid at such distance from the center of said street as that the center of said street shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the City Engineer as directed by the City Council. And the company owning or operating such other track shall, upon the application of said Des Moines River Line Street Railway Company, at its expense, remove its track to such point as may be designated by the City Engineer, and approved by the City Council, so that the two tracks may be an equal distance from the center of the street. And if within five days after such application is made such track is not so removed, then the Mayor shall order it to be so removed and laid by the City Marshal at the expense of the Des Moines River Line Street Railway Company. *Provided*, further, that if any other street railway company shall hereafter be granted the right to lay its track upon any

part of said street upon which said Des Moines River Line Street Railway Company, or its assigns, shall have a track, or tracks, of its railroad then laid or acquired, it shall on demand of said other company remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built; *provided*, however, that before it shall be required to make said removal the company desiring the same shall pay or tender the cost of making such change. And if upon such demand and tender of the cost of such removal the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshal, under the supervision of the City Engineer, at the cost of the company desiring such change. *Provided*, however, that there shall not be more than two tracks of any railroad laid on any part of said street except for the necessary switches and turn-outs nor shall said tracks be laid within twelve feet of the sidewalk on said street except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car houses and shops.

SEC. 1386. *Kind of Cars.*—SECTION 7. The cars to be used upon such tracks by said company, shall be of the best style and class used in other first class cities, and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used thereon for propelling the cars of said company, shall be of the most approved make and pattern, and shall be what are termed noiseless motors. And the
2261 gauge of said tracks shall be four feet, eight and one-half inches, and shall be laid with a five-inch tram rail upon all streets.

SEC. 1387. *Rights of Others.*—SECTION 8. This grant shall be subject to all the rights of the water and gas companies and street railway companies, under grants heretofore made to them by the City of Des Moines, and said City shall in no way be held liable to said company or its assigns, for any outlay or damage caused to said Des Moines River Line Street Railway Company by the construction or repairing of sewers, repairing or rebuilding of bridges, grading and repairing the streets on which such railroad track is laid; *provided*, the same is done in a reasonably careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 1388. *Rates.*—SECTION 9. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the City limits on any one route; *provided*, that such passage shall be continuous; *provided*, children under six years shall go free if accompanied by their parents.

SEC. 1389. *Use of Track.*—SECTION 10. The cars of said company shall be entitled to the track; and in all cases where any team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the bell or otherwise; and should the

person or persons in charge of such team or vehicle wilfully violate the provisions of this section, they shall upon conviction thereof, before the Police Judge of said City, be fined not less than $5, nor more than $25.

SEC. 1390. *Construction.*—SECTION 11. In the construction of its railway upon or over all bridges or viaducts upon the street or streets along which the same may run, said company shall so construct the same that the top surface of the rails of said railway shall be on a level with the surface of the floor of the bridge, and on all paved streets the top surface of the rail shall be on a level with the surface of the paving, and in case the City at any time shall pave or otherwise improve the surface of any street along which said railway may run, said parties, or their assigns, shall at their own expense, pave or otherwise improve the street or streets along which said street railroad company lay their track or tracks as provided by law; namely, to pave and maintain the pavement three and one-half feet each way from the center of their tracks, and that it shall substantially correspond with the improvement of the street outside of the rails and track. When the tracks are laid upon a street
2262 already paved, the said parties or their assigns, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails, and said parties, or their assigns, shall plank the space between the track at each principal crossing, whenever required by the City Council, and to its satisfaction, and they shall restore all streets, whether paved or not, to as good condition as before the laying down of their tracks.

SEC. 1391. *Abandonment.*—SECTION 12. A failure from any fault of said company to use any track or tracks so constructed, and run cars thereon, on any street or part of street, for a period of thirty days, shall be deemed the abandonment of such street or part of street by said company or its assigns, and the City Council may by resolution declare such street or part of street abandoned, and require the said company, or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove such track or tracks, when notified to do so, the City Council may cause the same to be removed at the expense of said company, or its assigns.

SEC. 1392. *Damages.*—SECTION 13. In constructing, repairing and operating said street railway, said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property and shall at all times respond to the City of Des Moines for, and save it harmless from all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers, or employés, in the construction, reconstruction, repairing or operating of said street railway, or in paving, repaving or repairing of said street or by reason of any and every act done under the provisions of this ordinance.

SEC. 1393. *Commence Work.*—SECTION 14. The said company, or its assigns, shall commence work on their line within two months from the acceptance of the terms and conditions of this ordinance,

and shall have its tracks completed and cars running thereon withi twelve months from the date of said acceptance.

SEC. 1394. *Arbitration.*—SECTION 15. The City of Des Moines e pressly reserves the right to allow and permit any street railway com pany to run its cars over and along the tracks, switches and turn outs of said road to be constructed under this ordinance, on sai parts of said streets, for the distance of three blocks or less, on suc terms and for such compensation as may be agreed upon by th companies interested; and in case of disagreement, then the sam to be settled by arbitration—one chosen by each of said com 2263 panies, and the two chosen to select a third, and the person thus chosen shall decide upon the terms and what would b a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by said company.

SEC. 1395. *Cable Road.*—SECTION 16. The slot rails used by sai company in the construction and maintenance of said road if i shall be constructed as a cable railroad, shall be constructed an placed so that the slot between said rails for the accommodation o the grip arm shall not exceed in width three-fourths of an inch and shall be so constructed as to present a flat and even surface and the upper surface of said slot rails, adjoining said slot shal not be made beveling, but shall be made flat and square so as t prevent the wheels of carriages and other vehicles, and the calks of shoes on horses or other animals from dropping into and catch ing on said slot while passing along or over the same.

SEC. 1396. *Rules and Regulations.*—SECTION 17. The cars or car riages operated by said company, shall be run along and upon said railway in conformity with the following rules and regulations, to-wit:

First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portions of the City, nor more than ten miles an hour elsewhere.

Second. While cars are turning corners from one street to another, they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing upon any street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop upon or over a cross-walk at intersecting streets, except to prevent a collision or to avoid danger to persons in the street, or to take on or leave off passengers.

Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any railway other than a street railway company.

Seventh. Cars after sunset shall be provided with signal lights.

SEC. 1397. *Superior Lien.*—SECTION 18. The rights and privi-

leges hereby conferred upon the company are upon the ex-
2264 press terms and conditions that any judgment that may here-
after be obtained against said company or assigns, for any injury to any person or property, on account of the construction or operation of said railway, shall be a lien upon all the property of said company, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

SEC. 1398. *Other Rules.*—SECTION 19. The City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 1399. *Acceptance.*—SECTION 20. Within six days from the passage of this ordinance, said company shall file with the City Clerk a written acceptance of the grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company.

SEC. 1400. *Per cent. of Net Earnings.*—SECTION 21. After the expiration of ten years from the passage of this ordinance, the said company shall pay annually to the City of Des Moines five per cent. of its net earnings, as consideration for the rights and privileges herein granted, but nothing herein shall be construed as exempting said Des Moines River Line Street Railway Company from taxation the same as other property subject to taxation.

SEC. 1401. *Steam Motors.*—SECTION 22. The City Council reserves the right, after six months from and after the steam motors have first commenced running upon the streets covered by this ordinance, should the same become unreasonably dangerous to public safety, to order the discontinuance of said motors upon the streets named in this ordinance.

SUBDIVISION VI.

An ordinance authorizing the construction and operation of certain street railroads in and along the streets of North Des Moines.

Passed May 9, 1885. [Chap. 21, R. O. North Des Moines.]

Be it ordained by the Town Council of the Town of North Des Moines:

SECTION 1402. *Franchise.*—SECTION 1. That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs side-tracks, and switches, in, along and upon all the streets, and such alleys only
fronting on which said company has depots, stables or car-
2265 houses, and over the bridges and on such streets in the town
of North Des Moines, with their present and future connections and extensions; and authority is hereby given to said company, their successors or assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereafter mentioned and prescribed.

SEC. 1403. *Motive Power.*—SECTION 2. The cars to be used on the tracks of the said Des Moines Street Railway Company shall be operated with steam power, such as used on street railways, and acceptable in other cities, or animal power, and no cars or carriages used on the tracks of any other company shall be used on the tracks of said street railway.

SEC. 1404. *Use of Cars.*—SECTION 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities; *provided* said company shall, at all times, have the right to use their track for transporting iron, ties or other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the town of North Des Moines and said company.

SEC. 1405. *Street Grade.*—SECTION 4. The tracks of said railway shall be laid so as to conform to the established grade of the streets on which the road may be built wherever the town has, or may have established such grades. Where streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets; *provided* that they raise the same to grade whenever the town shall grade the same, or any part thereof, and in case said town of North Des Moines pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve the space between the rails or track, so that it shall substantially correspond with the improvements of the street outside the track; *provided* said company shall plank the space between the tracks at each principal street-crossing wherever required by the street committee.

SEC. 1406. *Damage.*—SECTION 5. The said town of North Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying water or gas pipes, or the necessary repair of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

SEC. 1407. *Center of Street.*—SECTION 6. Said tracks shall be laid in the center of the streets in all cases where it is prac-
2266 ticable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such a distance from the center of said street as will make the center point between the two tracks the center of the street, and said track shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided. And where any line of railway shall be extended along and upon such alley as provided for in Section 1, a single track only shall be laid, and no side-tracks, switches or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks along and upon streets, shall be allowed on any such alley; *provided*, however, that if said company shall have its depot, station, stable or car-

houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car-houses.

SEC. 1408. *Rate of Fare.*—SECTION 7. The cars on any and every line or route of said railway in the town of North Des Moines shall connect with a line or route extending at least to Walnut street in the City of Des Moines, Iowa, and the rate of fare between the extreme terminus of any one route, whenever such terminus shall hereafter be fixed in the City of Des Moines, and the town of North Des Moines, respectively, shall not exceed five cents, and no discrimination shall ever be made against any points in North Des Moines and in favor of any point in the City of Des Moines, Iowa, on the same route.

SEC. 1409. *Right-of-way.*—SECTION 8. The cars of said company shall be entitled to the tracks, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said town of North Des Moines, such team or vehicle shall give way to such car, nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said railway cars by placing, driving, stopping, or causing to be placed or driven in a slow pace or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway or either of them, after being notified by the driver or conductor, by the ringing of the car bell, or otherwise. And whosoever shall wilfully violate any of the provisions of this section, shall upon conviction thereof, before any magistrate of said town of North Des Moines, be fined not less than $5, nor more than $50.

SEC. 1410. *Conditions.*—SECTION 9. This charter, is granted, and the rights and privileges herein conferred, are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one-half mile of said railway as an extension of its present line on Ninth street in the City of Des Moines, directly north on said Ninth street to the north corporation line of the town of North Des Moines fully completed and equipped, and cars running thereon by the 1st day of August, 1885; *provided*, however, if said company is delayed in the construction of said railway, by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of each half-mile of said railway. The foregoing extension of time for construction of said railway is granted upon the express condition that said company, in the construction of its railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

2267

SEC. 1411. *Not Exclusive.*—SECTION 10. The right herein granted to said company shall not operate to hinder the town of North Des Moines from chartering any other company for a like public service; and any company so chartered shall have equal rights to any street that may have been occupied by the Des Moines Street Railway

Company for the distance of not to exceed seven hundred feet; *provided*, that whenever any street shall be so used by more than one company, the company which shall be the last so to occupy the street, shall pay all the costs of so adjusting the tracks already laid as to give both companies said equal privileges.

SEC. 1412. *Tax Imposed.*—SECTION 11. Said company shall annually, on or before the 1st day of February of each year, after the year 1896, furnish to the Treasurer a statement of the net receipts of the company for the year ending on the 1st day of January next preceding, which said statement shall be subscribed and sworn to by the secretary and treasurer of the company, and there shall be levied on such proportion of such net receipts as the whole number of miles of railway owned and operated by said company in North Des Moines shall bear to the whole number of miles owned and operated by said company, a tax of three per cent. for municipal purposes, which tax shall be due at the same time, and shall be collected in the same manner as other taxes; and such tax, from the time of such levy, shall be a lien upon the property and franchise of said company, in the same manner and to the same extent that other taxes levied by the town of North Des Moines are liens. If such sworn statement as above required is not made and filed with the Treasurer within the time above prescribed, the Treasurer shall ascertain as nearly as may be, such net receipts, and municipal tax shall be levied thereon as above provided; and the tax herein above provided shall be in lieu of all taxes and assessments for all municipal purposes upon the property of said company, and of the right, property or interest of any person in the same, and the prop-
2268 erty and stock of said company, and the members thereof in the same shall not be taxed in any other manner for any municipal purpose. But prior to the year 1896, no taxes whatever for municipal purposes shall be levied upon the property of said company, or the right, property, or interest of any person in the same. And in case any such tax for municipal purposes is so levied the town of North Des Moines agrees and undertakes to pay the same.

SEC. 1413. *Rules and Regulations.*—SECTION 12. The cars or carriages of the company shall be run upon and along the track of said railroad in conformity with the following rules and regulations, to-wit:

First. No car shall be run at a greater rate of speed than six miles per hour.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity, or accident, or where cars are near stations.

Fourth. No cars shall be left to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor in front

of any intersecting street, except to avoid collision or to prevent danger to persons in the street, or to take on or leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when by so doing the injury may be avoided.

Seventh. All proper care shall be made by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductors and drivers shall use proper diligence to prevent children under twelve years of age, or ladies, from leaving or entering the car while in motion.

Ninth. Conductors or drivers shall announce to passengers in a distinct tone the names of all streets crossed, as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

Tenth. The cars after sunset shall be provided with signal lights.

2269 *Eleventh.* No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses, and at each end of the line and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

Twelfth. Within thirty days from the publication of this ordinance, said company shall file with the Recorder of said town a written acceptance of the grants herein made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted this ordinance shall operate as a contract between the town and said company; and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

Subdivision VII.

An ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines.

[Chap. 33, R. O. North Des Moines, passed July 6, 1886, as amended by Ordinance No. 42, passed August 8, 1888; Ordinance No. 48, passed December 5, 1888; Ordinance No. 50, passed February 18, 1889, and Ordinance No. 55, passed April 4, 1889.]

Be it ordained by the Town Council of the Incorporated Town of North Des Moines:

Section 1414. *Franchise.*—Section 1. That consent, permission and authority is hereby given and granted to, and vested in the Des Moines Electric Railway Company, successors of the North Des Moines Broad Gauge Street Railway Company, and its successors and assigns, to construct, equip, maintain and operate for the term of twenty-five years, upon the conditions hereinafter stated, a single

standard, four feet, eight and one-half inch gauge street railway track along and over the streets, alleys and bridges of and within the town of North Des Moines, hereinafter designated, and such other streets and alleys of said town as said company may select, with the consent and approval of the town council, and to construct and use in connection therewith, all necessary and convenient tracks for turn-outs and side-tracks along the streets and such alleys only fronting on which said company shall have depots, stables, car-houses or power stations, and to construct and use in connection therewith all appliances and apparatus necessary or convenient to the practical equipment and operation of the cars upon said tracks by electrical or such other practical motive power as may be adopted by said company for the operation of its street railways in
2270 the City of Des Moines; and in constructing and operating said railroads, said company shall have the right to intersect or cross the tracks of any street or other railway.

SEC. 1415. *Streets.*—SECTION 2. The streets specifically referred to in Section 1 hereof are the following: Sixth street from the south line to the north line of said town. Forest avenue from Sixth street to the west corporate limit of said town. Jefferson street from Sixth street to Thirteenth street and Clark street from Sixth street to west corporate limits of said town, and North street from Seventeenth street to the west corporate limits of said town.

SEC. 1416. *Use of Cars.*—SECTION 3. The cars to be used upon said tracks shall be of the same style and class as used at same time by said company upon its tracks in the City of Des Moines, and shall be operated by electrical power, animal power or other practical motive power, such as said company may at same time use upon its tracks in the City of Des Moines; *provided*, that if other power than animal power is used, said cars shall run upon a schedule time of not less than six miles, nor to exceed twelve miles per hour; and said tracks and cars shall be used for the purpose of transporting passengers and their ordinary baggage only; *provided* further, that said company shall at all times have the right to use said tracks for the purpose of transporting material to be used by it in constructing, repairing and operating said road.

SEC. 1417. *Construction.*—SECTION 4. In the construction of said tracks a tram railway only shall be used, the width of which shall not be less than four feet, eight and one-half inches from outside to outside; the width of the tram shall not be less than two and one-half inches horizontal. The height along the wagon edge, or from the rim to the highest part of the rail, shall not be more than seven-eighths of an inch.

SEC. 1418. *Street Grades.*—SECTION 5. The tracks shall be laid so as to conform to the established grade of any street upon which the road may be built whenever the same has or shall be hereafter built, whenever the same has or shall be hereafter established. Where the streets are not graded, the tracks may be so laid as to conform to the surface of the street, and in case the town shall at any time pave or otherwise improve the surface of any street along which said railway may run, said company, at its own expense, shall

pave or otherwise improve the space between its tracks so that it shall substantially correspond with the improvement outside its rails and tracks, and the top of the rail shall be level with the surface of the street or pavement, and said company shall plank the space between the tracks at each principal crossing whenever required so to do by the Council, and to their satisfaction, and they shall restore all streets to as good condition as before the laying down of its tracks.

2271 SEC. 1419. *Damages.*—SECTION 6. The town of North Des Moines shall not be held liable for any damages that may be occasioned by the breaking of any gas or water pipes, or for delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvements or repair of any street or streets.

SEC. 1420. *Tracks. Where Laid.*—SECTION 7. The tracks of the company shall be laid in the center of the street in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which last case the tracks may be laid at such a distance from the center of said street as will make the center point between the two tracks the center of the street; and said tracks shall not be laid within twelve feet of the sidewalk where the same can practically be avoided, and where any line of railway is laid along and upon any alley, as provided for in Section 1, a single track, only, shall be laid, and no side-tracks, switches or turn-outs, except where turn-outs are used to connect tracks laid along alleys with tracks laid along streets, shall be allowed on any such alley; *provided*, that if said company shall have its depots, stables or car-houses on any lot fronting on such alley, they shall have the privilege of laying turn-out tracks from such alley into such depots, stables, stations or car-houses.

SEC. 1421. *Rate of Fare.*—SECTION 8. The rate of fare shall not exceed five cents on any one route from the extreme north end to the extreme south end of such line in or out of North Des Moines and the City of Des Moines, and a like fare from the extreme east end to the west end of said track, in or out of North Des Moines and the City of Des Moines.

SEC. 1422. *Right-of-way.*—SECTION 9. The cars of the company shall be entitled to the track, and in all cases where a team or vehicle shall meet, or be overtaken upon the railway of said company, such team or vehicle shall give way to such cars. No person shall wilfully or maliciously obstruct, hinder or interfere with any of said railway cars or property by placing, driving or stopping, or causing to be placed, or driven in a slow pace or stopped, any team, vehicle or substance in, upon, across, along or on the track of said railway, after being notified by the driver or conductor, by the ringing of the car bell or otherwise, and whosoever shall wilfully violate any of the provisions of this section, shall upon conviction thereof, be fined in any sum not less than $5, nor more than $50.

SEC. 1423. *Rules and Regulations.*—SECTION 10. The cars or carriages of the company shall be run upon and along the tracks of

said railway, in accordance with the following rules and regulations:

2272 *First.* No car shall run at greater rate of speed than ten miles an hour for the first two years, and not less than four miles an hour including stops.

Second. While cars are turning corners the animals attached thereto shall not be driven faster than a walk.

Third. Cars moving in the same direction shall not approach each other nearer than two hundred feet, except in cases of unavoidable necessity or accident, or when near stations.

Fourth. Cars shall not be left standing on any street at any time, unless a team is attached thereto, in charge of a man, and the same is waiting for passengers or other proper purposes.

Fifth. No car shall be allowed to stop upon a cross-walk or upon any intersecting street except to prevent collision, or to avoid danger, or to take on or leave off passengers.

Sixth. The conductors and drivers employed by said company must use all reasonable care and diligence to prevent injury to persons or annoyance to passengers, and on the appearance of danger to any one on or near the track, the cars must be stopped, if by so doing the injury can be avoided.

Seventh. Reasonable care shall be used by conductors and drivers to prevent injury to teams, wagons, carriages and other vehicles.

Eighth. Conductors and drivers shall use all proper diligence to prevent ladies, and children under twelve years of age, from entering or leaving the cars while in motion.

Ninth. Conductors shall announce to passengers, in a distinct tone of voice, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any railway company.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. Cars shall not remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, at which excepted stations they may stand a longer time.

Twelfth. Any snow or other matter removed from the track shall be removed from the street or so disposed of as not to interfere with travel.

Thirteenth. Cars shall be run over the track each way, not farther apart than fifteen minutes, and the first car shall start from the north and west limits not later than six o'clock A. M. and the last car shall not reach said north and west limits earlier than eleven o'clock P. M.

2273 SEC. 1424. *Injunction.*—SECTION 12. Said company is required to run its cars over its line of railway on Sixth street in connection with its lines through the City of Des Moines so as to make continuous trips to and from Fourth and Locust streets in said City to the north and west ends of its line in the town of North Des Moines, with the same motive power that it shall use in said City, within six months from the passage of this amendment, and to construct and put in operation a line of its road on Forest avenue within

ne months from the passage of this ordinance; *provided,* that if rest avenue shall be paved within that time, that the tracks shall laid at the same time that the pavement is laid; *provided,* fur-er, that if said company shall be prevented by an injunction or ders of court, or by other means beyond its control, from comply-g with the provisions of this section within the time specified rein, then the time of such necessary delays shall be added to e time specified as an extension of such time. And if said com-ny shall fail to comply with the provisions of this section as to her street within the time herein allowed, then it shall be lawful r the town Council to declare a forfeiture of the rights of said mpany to occupy such street or both the streets herein granted neither of them have been occupied according to this ordinance thin the time specified, and compel a removal of the tracks from ch streets.

SEC. 1425. *Acceptance.*—Within thirty days after the passage of is ordinance, said company, its successors or assigns, shall file with e Recorder of the town of North Des Moines a written acceptance the grant herein made, and of the grant made in the original dinance as amended herein, with the conditions, regulations and nitations herein expressed, signed by the president and secretary said company; and upon failure to file such acceptance, this ordi-nce shall not become operative to vest in said company any rights privileges not previously acquired under said original ordinance.

SUBDIVISION VIII.

n ordinance to grant certain rights and privileges in the occupa-tion of certain streets of the incorporated town of North Des Moines to the Des Moines Belt Line Railway Company.

No. 54, passed February 28, 1889.

Be it ordained by the Town Council of the Incorporated Town of rth Des Moines:

SECTION 1426. *Franchise.*—SECTION 1. That there is hereby anted to the Des Moines Belt Line Railway Company its succes-sors and assigns, the right and privileges of constructing and 71 operating, with a single track, turn-outs, switches and turn-tables, a line of street railway, over, upon and along the fol-wing named streets, in said incorporated town of North Des oines, to-wit: On State street, from Main street west to corporate nits of said town. Such right and privileges shall continue for e period of twenty-five years from and after the passage of this dinance.

SEC. 1427. *Construction.*—SECTION 2. The said Des Moines Belt ne Railway Company shall have the right to construct its said acks with what is known as "T" rails, but shall so lay and main-in the same that they shall present the least practicable obstruc-on to public travel upon said streets.

SEC. 1428. *Completion of Road.*—SECTION 3. It is expressly pro-

vided, and this grant is upon the condition, that the said Des Moines Belt Line Railway Company shall complete this line of street railway and have the cars running on said street, from City of Des Moines to Eleventh street, within six months from and after the passage of this ordinance, and shall complete the remainder of this said line and have cars running on the streets above named within eighteen months from and after the passage of this ordinance, and if, at the expiration of said periods, the said Des Moines Belt Line Railway Company shall not have laid its rails and completed its line according to the above provisions, the Council may forfeit so much of said grant and the right and privilege of said company to such of said streets as are not, when said resolution of forfeiture is adopted, occupied by the said company in the manner aforesaid.

SEC. 1429. *Motive Power.*—SECTION 4. The said Des Moines Belt Line Railway Company may use such motive power for the purpose of propelling its cars as is now in use by the Des Moines Belt Line Railway Company, or by such other motive power that said company may hereafter adopt for said purpose.

SEC. 1430. *Time Table.*—SECTION 5. The said company shall run a car each way over its line from Locust street, in the City of Des Moines, to its western terminus, on State street, in the town of North Des Moines, every thirty minutes, between the hours of six o'clock A. M., and twelve o'clock, midnight, every day in the year, breakages or other unavoidable accidents only excepted, and each car shall run through from the points mentioned above without transferring passengers. Such road shall be for passenger travel only, and shall be at all times subject to reasonable rules and regulations prescribed by the North Des Moines Council.

SEC. 1431. *Grade.*—SECTION 6. The said company shall put all streets used by them to a practical grade, plank streets and alleys at its own cost, under the supervision of the streets and alley committee.

2275 SEC. 1432. *Time Limit.*—SECTION 7. That within eighteen months from the passage and acceptance of this ordinance, said company shall have its cars running from the City of Des Moines to Twenty-third street, in the town of North Des Moines, Iowa.

SEC. 1433. *Fuel.*—SECTION 8. Said company are granted this ordinance upon the express condition that they shall use for generating steam either hard coal, coke or coal oil, or other fuel that will create as little smoke as either of the above, and no soft coal to be used.

SEC. 1434. *Rate of Fare.*—SECTION 9. In no case shall the fee for one passenger over the entire route one way exceed the sum of five cents.

SEC. 1435. *Streets Granted.*—SECTION 10. That said charter is granted on the streets as specified which are accepted and occupied by the town as streets, and that the part and parts of said streets not now owned by the town are to be occupied as fast as they can be procured without expense to the town.

SEC 1436. *Damages.*—SECTION 11. Be it further ordained, that

all damages to the town or to any owners of abutting property caused by the passage of this ordinance, is to be settled by said company.

SEC. 1437. *Calling Streets.*—SECTION 12. The drivers of said company shall in all cases call the names of each street at each cross street on every trip.

SEC. 1438. *Streets Purchased.*—SECTION 13. Be it further ordained, that in all cases where streets are condemned or purchased by said company, the said streets shall be deeded to the town of North Des Moines, subject to the right-of-way of said company.

SEC. 1439. *Acceptance.*—SECTION 14. This ordinance shall be accepted by said company in writing, by the president and secretary thereof, within thirty days from its passage.

An ordinance granting certain rights and privileges in the occupation of streets and alleys in the town of North Des Moines, Iowa, to the Des Moines Belt Line Railway Company.

No. 87, passed February 7, 1890.

Be it ordained by the Town Council of the Town of North Des Moines:

SEC. 1440. *Streets Granted.*—SECTION 1. That there be and is hereby granted to the Des Moines Belt Line Railway Company the right to build, maintain and operate a single or double-track
2276 street railway, with all necessary switches and turn-outs, along and over the following streets and alleys in the town of North Des Moines, to-wit:

On all streets and alleys within the corporate limits of said town and lying north of the Des Moines river; south from the Des Moines river on Sixth avenue to Prospect Boulevard; on Prospect Boulevard west to Seventh street; south on Seventh street from Prospect Boulevard to College avenue, and south on Fifth street from College avenue to south corporation line; south from Des Moines river on Arlington avenue to south corporation line; on College avenue from the east to the west corporation lines; south from College avenue on Sixteenth street to south corporation line. And the said railway company is hereby authorized to propel its cars on the streets and alleys heretofore named, by electric or any other power, except steam or animal, for the term of twenty-five years; and the power herein granted to operate its said road with electric or any other power, except steam or animal power, shall be exclusive for the term of five years from the acceptance of this ordinance. And the exclusive privileges or rights herein specified, are granted only upon the condition that said Des Moines Belt Line Railway Company shall, at all times after the completion of their tracks or lines as herein named, operate the same in a manner to give good and sufficient service to the public; and a failure to operate said road in the manner herein described, shall work a forfeiture of said exclusive privilege.

SEC. 1441. *Operation.*—SECTION 2. In the construction and operation of said company's railway over said streets and alleys said

company shall exercise all reasonable care so as to not unnecessarily interfere with or impede the public travel on said streets and alleys. All new tracks laid by said company shall be laid so as to conform to the established grade of the town if the surface of the street has been brought to grade, and if not, then the track may be laid so as to conform to the surface of the street and shall be brought by the company to grade when the town brings its streets or alleys or any part thereof to grade free from expense to the town.

SEC. 1442. *Construction.*—SECTION 3. The tracks of said company shall be laid in the center of said streets or alleys except where a double track is contemplated, or when some other company shall be hereafter authorized to lay a track on the same street, and in either of said last named cases the tracks shall be laid at such distance from the center of said streets as that the center of said streets shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the town Engineer at the expense of said company or companies; *provided*, further, that if any other street railway company shall hereafter be
2277 granted the right to lay its track upon any part of said streets or alleys upon which said Des Moines Belt Line Railway Company, or its assigns, shall have a track or tracks of its railway then laid or acquired, it shall, on demand of said other company, remove its track or tracks to such distance from the center line of said street, as that the center line of said street shall be an equal distance from the outer rail of said two roads when built; *provided*, however, that before it shall be required to make such removal, the company desiring the same shall pay or tender the cost of making such change, and if upon such demand and tender of the cost of such removal, the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshal under the supervision of the town Engineer, at the cost of the company desiring such change; *provided*, however, that there shall not be more than two tracks of any railway laid on any part of said streets or alleys except for the necessary switches and turnouts, nor shall said tracks be laid within twelve feet of the sidewalk, except at points where turnouts are necessary for the convenient operation of the road for reaching its stations, car houses and shops, except when authorized by ordinance or resolution of the town Council.

SEC. 1443. *Kind of Cars.*—SECTION 4. The cars to be used upon the tracks of said company shall be of the best style and class used in other cities, and all motors used thereon for propelling the cars of said company shall be of the most approved make and pattern.

SEC. 1444. *Damages.*—SECTION 5. This grant shall be subject to all the rights of water and gas companies under grants heretofore made to them by the town of North Des Moines, and said town shall in no way be held liable to said company, or its assigns, for any outlay or damage caused to said Des Moines Belt Line Railway Company by the construction or repairing of sewers, repairing or building of bridges, grading and repairing of streets and alleys, on which railway track is laid; *provided*, the same is done in a careful and

expeditious manner, or damage resulting in the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 1445. *Rate of Fare.*—SECTION 6. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the city limits of the City of Des Moines and the town of North Des Moines, on any route; *provided*, that such passage shall be continuous; *provided*, children under six years of age shall go free, if accompanied by their parents.

SEC. 1446. *Right-of-way.*—SECTION 7. The cars of said company shall be entitled to the track in all cases when a team or
2278 vehicle shall meet or be overtaken by the cars of said company upon the railway track of said company. Such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the car bell, or otherwise; and should the person or persons in charge of such team or vehicle wilfully violate the provisions of this section, they shall, upon conviction thereof before the Mayor of this town, be fined not less than $5, nor more than $50.

SEC. 1447. *How Constructed.*—SECTION 8. In the construction of its railway upon or over all bridges, upon the street or streets along which the same may run, the said company shall so construct the same that the top surface of the rails of said company shall be on the level of the surface of the floor of the bridge; and on all paved streets tram-rails only shall be used, the top surface of which shall be on the level with the surface of the paving, and in case the town at any time shall pave or otherwise improve the surface of any street upon which said company may run, said company, or its assigns, shall at its own expense pave or otherwise improve the surface of the space of three and one-half feet each way from the center of the space between the rails of their tracks, that it shall substantially correspond with the improvements of the street outside of the rails and track. When the tracks are to be laid upon a street already paved, the said parties, or their assigns, shall deposit with the Treasurer, on estimate of the Town Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving of the space of three and one-half feet each way from the center of the space within the rails; and said parties, or their assigns, shall plank the surface between the tracks at each crossing whenever required by the Town Council, and to its satisfaction; and they shall restore all streets, whether paved or not, to as good condition as before the laying down of their track.

SEC. 1448. *Forfeiture.*—SECTION 9. A failure from any fault of said company to use any track or tracks so constructed, and run cars thereon according to the rules herein named and such other reasonable rules and regulations as may be hereafter adopted by the Town Council on any street or part of streets, shall be deemed the abandonment of said street or part of streets by said company, or its assigns, unless temporarily prevented by unavoidable accidents, or some cause over which said company has no control; and the Town Council may by resolution declare such street or part of streets

abandoned and require said company, or its assigns, to remove their track or tracks from such street or part of streets, and upon failure or refusal of said company to remove its track or tracks when notified to do so, the Town Council may cause the same to be removed at the expense of said company, or its assigns.

2279 SEC. 1449. *Damage.*—SECTION 10. In constructing, repairing or operating said street railway, said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property, and shall at all times respond to the town of North Des Moines for and save it harmless from all and every damage, injury, cost or expense, caused or occasioned by reason of any act of said company, officers or employés in the construction, reconstruction, repairing or operating said street railway, or in paving, repaving or repairing of any streets, or by reason of any and every act done under the provisions of this ordinance.

SEC. 1450. *Operation.*—SECTION 11. Said company or its assigns, shall commence work on their lines within six months from the acceptance of the terms and conditions of this ordinance, and shall have its tracks completed and cars running thereon within eighteen months from the date of said acceptance, and if the work is not begun and track completed and the cars running thereon within the time herein specified, then the Council may elect to annul this ordinance and forfeit all rights of said Belt Line Railway Company thereunder.

SEC. 1451. *Arbitrators.*—SECTION 12. The town of North Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches, turn-outs and turn-tables of said road to be constructed under this ordinance, on said part of said streets for the distance of two blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested; and in case of disagreement, then the same to be settled by arbitrators, one chosen by each of said companies, and the two so chosen to select a third, and the persons thus chosen shall decide upon the terms and what would be reasonable compensation as to the use of such road, and such terms and conditions are expressly consented to by the said company.

SEC. 1452. *Streets.*—SECTION 13. That said ordinance is granted on the streets and alleys, as specified, which are accepted and occupied by the town as streets and alleys, and that part and parts of said streets and alleys not owned by the town may be occupied as fast as they can be procured without expense to the town.

SEC. 1453. *Superior Lien.*—SECTION 14. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that they shall not occupy the present roadway on the bridge over the Des Moines river at Sixth avenue; that it shall not lay any track between the present curb lines of Sixth avenue from the north end of bridge to north corporation line; that any judgment that may be hereafter obtained against said com-

2280 pany, or assigns, for any injury to any person or property on account of the construction or operation of said railway, shall be a lien upon the property of said company, and such liens

shall be prior and superior to the liens of any mortgage or trust deed executed by said company.

SEC. 1454. *Rules and Regulations.*—SECTION 15. The town Council reserves the right to adopt, from time to time, and to compel compliance therewith, reasonable rules and regulations for the operations of the cars of said company.

SEC. 1455. *Steam Motors.*—SECTION 16. The said Des Moines Belt Line Railway Company is hereby authorized and permitted to use steam motors in the construction of its tracks over said streets and alleys, and to open track in times of heavy snow-storms.

SEC. 1456. *Acceptance.*—SECTION 17. Within thirty days of the passage of this ordinance, said company shall file with the town Clerk a written acceptance of the grants herein named, of the conditions, regulations and limitations thereof, signed by duly authorized officers of said company.

SEC. 1457. *Use of Sixth Avenue.*—SECTION 18. The said Des Moines Belt Line Railway Company is authorized to lay a single track and operate its cars thereon on Sixth avenue, in the west park thereof, north of the Des Moines river.

SEC. 1458. *Take Effect.*—SECTION 19. Be it further ordained, that this ordinance shall take effect and be in force from and after its passage and acceptance by said company, as herein specified, publication of this ordinance to be without expense to the town.

SUBDIVISION IX.

An ordinance authorizing the Des Moines City Railway Company to use its railways, tracks and cars for carrying the United States mail, express and freight, and for carrying material for the construction and operation of its roads.

No. 711, passed February 4, 1895.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1459. *Carrying Mail.*—SECTION 1. That the tracks, railways and cars now or hereafter owned or operated by the Des Moines City Railway Company, (the assignee of the Des Moines Street Railway Company or of other companies to whom this City and the several cities and towns adjacent thereto and now embraced in and forming a part of the City of Des Moines, heretofore granted certain street railway franchises), may for the period of eight years be used by said City Railway Company, or its assigns, for carrying the United States mail and express matter; *provided*, that
2281 such express matter shall only be received at and distributed from stations along the lines of said company's roads, which stations shall not be nearer together than one-fourth of a mile.

SEC. 1460. *Carrying Freight.*—SECTION 2. Said company is further authorized to carry freights over the following lines of its roads, to-wit: Its Belt line and Sevastopol line and a connection thereof which connection shall be made by extending its line from the Sevastopol line north along the east side of Front street to the north

line of Locust street; thence northerly along or over the alley running north and south through block two (2) of Good's Central addition, to the south line of Grand avenue; thence northerly across Grand avenue and Chestnut street in as nearly a direct line as may be, to connect with the Belt line railway at or near the point where the Belt line inter-sects Commercial street; *provided*, however, that until said railway company shall obtain the right-of-way for the connecting line above designated, it is authorized to run its cars for the purpose of conducting said business, west on Commercial street to Second street; thence southerly on Second street to Locust street; thence east on Locust street to connect with said line on Front street. And it is also authorized to haul freight over and along such extensions of its said Belt line as may be made to the various industries situated in the north portion of the City including the Iowa Brick Company and the Flint Brick Company; and also over and along such extensions as may be made in a southerly direction from the said Sevastopol line. Said company may run switches from said line on West First street, west into the several alleys running west therefrom, and haul freight over the same; *provided*, said switches shall not run further west along said alleys than West Second street, and said switches shall be laid with the consent of the parties owning property abutting on that portion of said alleys in which said switches may be laid.

SEC. 1461. *Freight to Power House.*—SECTION 3. Said company shall also have the power to haul freight over and along the line of its roads running from said connected lines to its power house, which line runs along Locust street to East Second street; thence north on East Second street to Maple street; thence east on Maple street to East Fourth street; thence north on East Fourth street to its said power house. It may also run switches from the same through the alleys crossing the same. And it may also connect with the several railways crossed by its railway; *provided*, persons owning property abutting on that portion of said alleys which shall be occupied by said switches, shall consent thereto. It is further provided that the trains hauling freight along said lines shall not consist of more than one motor car and two other cars.

2282 SEC. 1462. *Per cent. of Receipts.*—SECTION 1. The said company shall annually on or before the 15th day of December of each year, furnish to the City Treasurer a statement of the gross receipts of the company arising from the carrying of mail, express matter and freight for the year ending the 1st day of December of that year, which statement shall be subscribed and sworn to by the secretary and treasurer of the said City Railway Company, and as a consideration for the privileges herein granted, the said company for the period of eight years from the date of the acceptance of this ordinance, shall pay into the treasury of the City of Des Moines a sum equal to five per cent. of such gross receipts; said payment to be made by the said company on or before the 1st day of January immediately following the making of the report above required.

SECTION 1463. *Steam Power.*—SECTION 5. That in exercising the

privileges herein granted, the cars of the said company shall not be operated by steam locomotives or steam motors, but by electricity only. And the City reserves the right to pass and the company shall accept such reasonable rules and regulations for the exercise of the privileges herein granted as the safety and convenience of the people may require.

SEC. 1464. *Damages.*—SECTION 6. This grant is upon the express condition that the said City Railway Company shall save the City harmless from all damages or claims for damages arising from or growing out of this grant and the exercise thereof, and that the said City Railway Company shall pay all damages to abutting property owners that may under the law be assessed against said railway company for building and operating its roads under this grant, if any.

SEC. 1465. *Rules and Regulations.*—SECTION 7. The carrying of mail, express and freight through the streets of the City shall be subjected to the following restrictions and regulations:

First. No freight train having more than one car drawn by a motor shall be permitted to run on West Second street, except between the hours of six o'clock P. M. and six o'clock A. M.

Second. Freight cars will not be permitted at any time to stop on street crossings.

Third. Freight cars must not be permitted to stand on the public streets for any purpose.

Fourth. The carrying of mail or express matter must not in any manner hinder or delay passenger cars, and stations for delivery of mail, express and freight must be so situated that the stopping of the cars used for such purposes while loading or unloading will not obstruct the streets or hinder and delay other traffic.

Fifth. The right is expressly reserved to make further
2283 reasonable rules and regulations at any time governing the carrying of freight.

Sixth. In case the said company fails or refuses to make the report as provided in Section 4, of its gross receipts for carriage of freight, mail and express matter, it shall forfeit the sum of $25 per day for each and every day such report is delayed, which sum may be recovered in an action against the company, or its rights under this franchise may be forfeited at the election of the City on giving ten days' notice of such intention.

Seventh. Any officer or employé of the said City Railway Company who violates any of the provisions of this section, may be fined the sum of $5 and costs for each offense and may be committed to jail until such fine and costs are paid.

Eighth. The charge for carrying freight within the City limits shall not exceed $3 per car for any single haul.

SEC. 1466. *Expiration of Charters.*—SECTION 8. Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway Company beyond the times as fixed in their original charters, and if the charters of any of said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time.

SEC. 1457. *Connection With Brick Plants.*—SECTION 9. That said City Railway Company shall extend its Belt Line track to the plants of the Iowa Brick Company and the Flint Brick Company within sixty days from the time each of said companies shall have procured and graded a right-of-way, of sufficient width, to its plant by the most feasible route to the Iowa Brick Company along the south bank of the river if right-of-way can be reasonably secured and graded, or to a point upon the north or east bank of the river nearest to its plant, if the Iowa Brick Company shall so elect. The grade to each of said plants not to exceed two per cent.

SEC. 1458. *Conditions.*—SECTION 10. This ordinance shall not be of any force or effect unless the Des Moines City Railway Company shall file its acceptance of the same within sixty days of its passage, and unless said acceptance is accompanied with a certificate from the City Clerk that the Des Moines City Railway Company has fully complied with all requirements of Section 8, of Chapter 59 of the Revised Ordinances of the City of Des Moines, of 1889 (by building the wall as required by the City Engineer on the east side of the south two hundred and sixteen feet west of Bluff street of lot 2, official plat, West one-half Northwest quarter of three, and East one-half Northeast quarter Section 4, Township 78, Range 24, and *provided*, further, that said City Railway Company in consideration of the privileges granted by this ordinance shall file with said acceptance a receipt in full for all demands against the City of Des Moines to date, for or on account of any and all claims because of moving its tracks on West Eleventh and Twelfth streets, in order to permit a sewer to be constructed in 1893, and until said certificates and receipts are filed with said acceptance, this ordinance shall not go into effect.

2284-2303

SEC. 1469. *Repeal.*—SECTION 11. That all ordinances or parts of ordinances with regard to carrying United States mail, express and freight, only, in conflict with the provisions of this ordinance, be and the same are hereby repealed.

SEC. 1470. *Take Effect.*—SECTION 12. This ordinance shall take effect and be in force from and after its publication as required, which publication shall be at the expense of the Des Moines City Railway Company; *provided*, that the said Des Moines City Railway Company shall have complied with all the requirements of this ordinance.

* * * * * * *

2304-2322 *Certificate.*

STATE OF IOWA, *Polk County, City of Des Moines, ss:*

I, E. W. Woodruff, City Clerk of the City of Des Moines do hereby certify that the foregoing pages, 1-499, contain the Revised Ordinances of 1900, of the City of Des Moines, as approved and ordered published by resolution of the City Council, and that the several ordinances and resolutions therein contained are true copies of the originals as they are of record in my office.

Witness my hand and official seal this 19th day of March, 1900.

E. W. WOODRUFF,
[SEAL.] *City Clerk City of Des Moines, Iowa.*

2323 In the Supreme Court of the United States, October Term, 1907.

No. 437.

CITY OF DES MOINES, Appellant,
vs.
DES MOINES CITY RAILWAY COMPANY, Appellee.

Stipulation.

There is attached hereto, a transcript of a part of the record in this cause in the circuit court of the United States for the southern district of Iowa, which through oversight was omitted from the transcript of the record heretofore certified and returned by the clerk of the said court as a part of the return to the writ of error in this cause.

It is hereby stipulated that the transcript attached hereto be now filed in the office of the clerk of the supreme court of the United States as an addition to, and a part of the record heretofore filed in this cause; and that when so filed, the same shall be a part of the record, with the same effect as if it had been included in the return to the writ of error in this cause.

The appellee, however, does not hereby stipulate or agree that the record as amended by this stipulation is either true or complete and does not waive any right which it may have to hereafter correct any inaccuracies or omissions which may appear in said record.

CITY OF DES MOINES, *Appellant.*
By W. H. BREMNER,
Its Solicitor and Counsel.
DES MOINES CITY RAILWAY COMPANY.
By N. T. GUERNSEY,
GEO. H. CARR,
W. L. READ,
Its Solicitors and Counsel.

[Endorsed:] Filed Nov. 22, 1907. E. H. Mason, Clerk.

2324 And afterwards, to-wit, Sept. 17, 1907, there was filed in the Clerk's office in said Cause Complainant's Testimony which is in words and figures as follows, to-wit:

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Complainant's Testimony.

2325 Complainant's Index to Oral Testimony.

Name.	Direct.	Cross.	Redirect.	Recross.	Recall.
Jefferson S. Polk	3	19	23	23	265
N. T. Guernsey	36	38	...	...	...
F. C. Tate	142	152	...	...	...
G. B. Hippee	154	229	238	240	284
Walter McCain	242	263	...	...	...
N. T. Guernsey	...	...	...	...	465

2326 In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Testimony taken in behalf of the Complainant, in accordance with the attached stipulation, at the Office of N. T. Guernsey, room 306, Manhattan Building, Des Moines, Iowa, commencing at 10 o'clock A. M., on the 5th day of March, 1906, before J. P. Blaise, Examiner.

Appearances: Geo. H. Carr, W. L. Read, and N. T. Guernsey, Appearing for the Complainant. William H. Brenner and M. H. Cohen, Appearing for the Respondent.

2327 Complainant offers in evidence Exhibit No. 1, the same being the Articles of Incorporation of the Des Moines Street Railway Company, filed for record, December 10, 1866.

The Complainant offers in evidence Exhibit No. 2, being a certified copy of the Articles of Incorporation of the Des Moines Sevastopol Street Railway Company, filed December 18, 1883, and of the Amended and Substituted Articles of Incorporation of the said Company, filed August 1, 1885.

The Complainant offers in evidence Exhibit No. 3, being Articles of Incorporation of the Des Moines Broad Gauge Street Railway Company, filed December 7, 1885.

The Complainants offers in evidence Exhibit No. 4, being Articles of Incorporation of the Des Moines Street Railroad Company, filed for record June 30, 1886.

The Complainant offers in evidence Exhibit No. 5, being certified copies of the two Amendments to the Articles of Incorporation of the Des Moines Street Railroad Company, and the Amended and Substituted Articles of that Company; the first Amendment having been filed September 5, 1889; the second Amendment, February 25, 1891, and the Amended and Substituted Articles first filed, September 27, 1892.

The Complainant offers in evidence Exhibit No. 6, the same being a certified copy of the Articles of Incorporation of the Des Moines Rapid Transit Company, filed for record, October 10, 1887.

2328 The Complainant offers in evidence Exhibit No. 7, being Articles of Incorporation and Amendment thereto, of the Des Moines Belt Line Railway Company, filed for record, April 23, 1888.

The Complainant offers in evidence Exhibit No. 8, being Articles of Incorporation of the Des Moines Electric Railway Company, filed for record, July 31, 1888.

The Complainant offers in evidence Exhibit No. 9, being Articles of Incorporation of the Des Moines River Line Railway Company, filed for record, September 8, 1888.

The Complainant offers in evidence Exhibit No. 10, being Articles of Incorporation and Amendment thereto, of the Des Moines Suburban Railway Company, filed for record, October 9, 1890.

The Complainant offers in evidence Exhibit No. 11, being Articles of Incorporation of the Des Moines City Railway Company, filed for record, July 25, 1893.

JEFFERSON S. POLK of lawful age, being duly sworn, examined in chief by N. T. Guernsey, Esq., testified as follows:

Int. 1. Mr. Polk you reside in Des Moines?

Answer. Yes sir.

Int. 2. How long have you lived here; when did you come here, if you remember?

Answer. I have been here over 30 years. I located here in 1855 moved here in 1856.

2329 Int. 3. You were engaged in the practice of the law here for a good many years?

Answer. Yes sir.

Int. 4. You have not been in the active practice for the last few years?

Answer. I have not been up until recently, I have been pretty actively engaged.

Int. 5. What relation do you sustain to the Complainant, the Des Moines City Railway Company?

Answer. I am its President.

Int. 6. The Articles of Incorporation of the Des Moines Street Railway Company have been introduced in evidence, and marked I think, Exhibit No. 1, were you connected with that Company?

Answer. I was.

Int. 7. And what is the fact, as to whether you were one of the incorporators of that Company?

Answer. I was one of the incorporators and was the attorney for the Company.

Int. 8. Were you also interested as a stock holder?

Answer. I was. The stock was owned by Mr. M. P. Turner, U. B. White, Mr. Hubbell and myself, in four equal parts.

Int. 9. Do you remember when it was that you and Mr. Hubbell disposed of your interests in the Company, the Des Moines Street Railway Company?

Answer. I think it was some two years afterwards, the exact date I wouldn't want to give you without I investigated it; I have-n't it in mind. If you want to be exact about it, I can tell you just the date.

23:30 Int. 10. After you sold out your interests in the Des Moines Street Railway Company, you had no further interest in the street railroads here until about 1888, or 1889, did you?

Answer. That is the case; yes, sir. I sold my interest in the Street Railway Company absolutely to Dr. Turner, and in that Company I never had any interest until the consolidation that was made in 1889, I believe, September 5th; I then acquired the interest in the Street Railroad Franchise which had before that time purchased the Street Railway.

Int. 11. You said you acquired the interest in the Street Railroad franchise; you meant the Des Moines Street Railroad Company, which had purchased the property of the Des Moines Street Railway Company?

Answer. Yes, sir; that is what I meant. I intended to say.

Int. 12. State who, if you know, prepared the original draft for the ordinance passed December 19, 1887, by the City of Des Moines, and commonly known as the Turner Ordinance, which is set up in paragraph 3 of the Bill in this cause?

Respondent objects to the question as being immaterial, irrelevant and incompetent. The question of who drew or prepared that ordinance has no bearing upon the merits of this controversy.

Answer. I did, acting as attorney for the Company, and also as one of the stockholders.

Int. 13. Immediately prior to the passage of this Ordinance, what is the fact, as to whether there was any hearing before the Council, or any public discussion of the ordinance and its terms, before it was finally passed by the council?

Respondent objects to the question as immaterial, irrele-
23:31 vant and incompetent; and further, that any discussion which might have been had before the council prior to the passage of the ordinance, cannot affect, alter or change the terms of the ordinance itself.

Answer. The matter was pending before the City Council for quite a while, and was at various times up for discussion before the Council; whether there was a special committee or committee of the whole, I do not at this time remember, but it was before a committee,

and the terms were finally agreed upon and submitted to the Council for their action. It was thoroughly discussed.

Int. 14. Now please state, what if anything was said at the hearings in question, in your presence, as to the duration of the non-exclusive feature, of the ordinance, or the right granted by the ordinance?

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent; that it appears from the previous answer of this witness that this discussion, or whatever discussion took place, took place before a committee of the Council, and not before the Council.

Answer. The whole ordinance was gone over with in the presence of the Council, sitting as a council, and in the presence of the Committee, and it was understood by them and insisted upon by myself as attorney for the stockholders, that the franchise would not be accepted, unless it was perpetual and exclusive. I insisted on an exclusive franchise for 50 years; that matter was discussed fully at quite a number of the meetings, and it was finally agreed that we could take a perpetual franchise with an exclusive feature for 30 years, and that was embodied in the ordinance.

2552 Respondent moves to strike out the answer of the witness as not responsive to the question, and as stating conclusions of the witness as to an understanding of the council.

Int. 15. Mr. Polk, do you remember whether the original draft of the ordinance contained this 10 year term for the exclusive right?

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent.

(Question withdrawn.)

Int. 16. Now, what was urged upon the council at that time, Mr. Polk, as a reason why this right should be exclusive for some period to be agreed upon?

Respondent objects to the question as immaterial irrelevant and incompetent, for the reason that any reasons which may have been urged before the council for the insertion of particular clauses in the franchise in question cannot vary the meaning of the terms of the franchise itself.

Answer. The fact that it was an experiment as to whether street cars would be remunerative in Des Moines. The City was then a small village, sparsely settled, and unless we could get a franchise that would be exclusive for a period of time that would enable us to get back our investment, we refused to have anything to do with it. The town was then, I would say, not over 5,000 people, and while we all were ambitious and had great hopes for the future, we did not know whether those hopes would be realized or not, and we did not want to, and in fact refused to put the money into it necessary to build the road, unless we had a guaranty that we would have control of the situation for a length of time that would enable us to get back our investment.

Respondent moves to strike the answer of the witness, for the reasons stated in the objection to the question, and for the further reason, that the answer of the witness simply states a conclusion.

Int. 17. Do you remember a reference made to the ordinance in the Register at that time, and what the Register referred to as the probable use that could be made of a street railroad in Des Moines, the Register being a newspaper published here?

Answer. I do.

Int. 18. Will you furnish us an extract from the Register that has been referred to?

Answer. I can and will. I suppose you want the reference that was made by the Register after the passage of the ordinance, giving notice to the public that the ordinance had passed, and its probable usefulness in the future?

Int. 19. Yes; that is what I want.

Int. 20. When the Des Moines Street Railway Company originally built its line, after the Turner Ordinance of December 10, 1866, was granted, what was the gauge, Mr. Polk?

Answer. Four feet eight inches and a half, or standard gauge.

Int. 21. Was this gauge afterwards changed?

Answer. It was.

Int. 22. When was the first change made in this gauge, if you remember?

Answer. I wouldn't undertake to give the exact date, but I think it was about the time we sold out, say, two years after the first track was laid.

Int. 23. What did the gauge then become?

2334 Answer. Three feet.

Int. 24. Did it remain a three foot gauge until after what we call the consolidation, in 1889?

Answer. It did, and I widened it out when I became President of the new Company. The gauge was narrowed by Turner, because the thing wasn't paying; there wasn't much likelihood of it ever paying, and he could build a narrow gauge cheaper than he could a broad gauge, and when we purchased, at the time of the consolidation, I became interested in it, and we saw the necessity of having a uniform gauge, we widened it, changed it back to 4 feet 8½ inches.

Respondent moves to strike the latter part of the answer of the witness, being all that part following the first sentence thereof, as stating conclusions of the witness.

Int. 25. Mr. Polk, I wish you would state whether you had any ordinance before you for use as a model, or for use in making suggestions when you prepared the ordinance of December 10, 1866, which we call the Turner Ordinance?

Answer. I did.

Int. 26. I wish you would look at the paper marked Exhibit No. 12, and entitled, "An Ordinance authorizing the construction, extension and operation of certain passenger railways in and upon the streets of the City of Indianapolis," which appears to have been passed January 18, 1864, and state whether it was a copy of that

ordinance which you used in connection with the preparation of the draft of the Turner Ordinance?

Answer. I can better answer that with an explanation.

Respondent objects to the question as being immaterial, irrelevant and incompetent; whatever Mr. Polk may have had before
2335 him as a model for the Turner franchise, cannot affect the merits of this controversy.

Answer. Exhibit No. 12, is a copy of the ordinance, the Indianapolis Ordinance that I had before me and used at the time of the preparation of the Turner Ordinance, which was afterwards passed in December 10, I believe, 1866, and that ordinance was modelled from this, in a great many respects.

Int. 27. That is, you mean, by that ordinance, the Turner Ordinance was modeled in many particulars after the Indianapolis Ordinance?

Respondent interposes the same objection as last above made.

Answer. The Turner Ordinance was modeled and based on many sections of the Indianapolis ordinance which you have referred to.

Int. 28. Will you add what explanation you wanted to make?

Answer. Indianapolis was then regarded in Des Moines as a model City, and was about the only city of any size that we knew anything about that was similarly situated to Des Moines, and I sent to Indianapolis, to the Mayor, I think, and got a copy of this ordinance, which is set out here as Exhibit No. 12, and used that in drawing the Turner Ordinance.

Respondent moves to strike the explanation of the witness as being immaterial, irrelevant, incompetent, and as stating opinions and conclusions of the witness.

Int. 29. What has become of the copy of the Indianapolis ordinance that you used in 1866?

Answer. I don't know; I have looked for it among my old papers, but cannot find it.

2336 Complainant offers in evidence Exhibit No. 12, being certified copy of an ordinance passed January 18, 1864, by the City of Indianapolis, entitled, "An Ordinance Authorizing the Construction, Extension and Operation of Certain Passenger Railways in and upon the Streets of the City of Indianapolis."

Which offer is objected to on part of the Respondent as being immaterial, irrelevant and incompetent, not being an ordinance of the City of Des Moines, or an ordinance under which the Des Moines City Railway Company, the complainant in this action, claims any rights; and for the further reason, that it is immaterial as to what ordinance or ordinances were used as models for the drafting of the Turner franchise of 1866.

"It is understood that the ordinance passed by the City of Des Moines, on December 10, 1866, and entitled, "An Ordinance Authorizing the Construction and Operation of certain street Railroads in and along the Streets of the City of Des Moines may be referred

to by either party as the Turner Ordinance or Turner Franchise, without further identification."

Int. 30. Please state, whether a copy of this ordinance of January 18, 1864, which has been marked Exhibit No. 12 and was passed by the City of Indianapolis, was before the City Council of the City of Des Moines, while it had the Turner Ordinance under consideration, and if so what was said with reference to the changes from the Indianapolis Ordinance that were made in the draft of the Turner Ordinance?

2337 Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the Turner Franchise being not ambiguous in its terms; whatever may have been before the City Council at the time of its passage cannot serve to vary its terms; the Council proceedings as they appear of record in the Record Book of the City Clerk's office are the best evidence of what took place, and this is not the best evidence.

Answer. The Indianapolis ordinance, the copy of which is marked Exhibit No. 12, was before the City Council when the Turner Ordinance was being discussed and finally acted upon. The Indianapolis Ordinance, as I remember, provided that it should exist for 30 years, and the attention of the Council was called to that fact, and it was discussed, and I refused peremptorily to accept the ordinance unless the time was perpetual, unless it was a perpetual ordinance, and that it should be exclusive, as I insisted, for 60 years; but finally we agreed upon the 30 years' exclusive feature, and the Turner Ordinance was changed in that particular, and section 5 of the Indianapolis Ordinance was changed, so that it gave us a franchise, a perpetual franchise, with the exclusive right for 30 years, and that was finally adopted.

Respondent moves to strike the whole answer of the witness, for the reasons stated in the objections to the question, and because that part of the answer which states that the Turner franchise was changed so as to give the Des Moines Street Railway Company a perpetual franchise, is a conclusion and opinion of the witness.

Int. 31. You referred to the Turner Ordinance as being 2338 changed in connection with the original provision for 60 years' exclusive right, and finally for 30 years; you mean that the draft of the ordinance was changed prior to the enactment of the ordinance by the Council, as to this time of the exclusive right?

Answer. I may have been unhappy in saying the Turner Ordinance was changed. I meant to say, that the clause in the Indianapolis Ordinance was changed so that it gave us a perpetual franchise and an exclusive franchise for 30 years, and this change was adopted and agreed upon by all of us and inserted in the Turner Ordinance which was finally passed.

Respondent moves to strike out that part of the answer of the witness which states, that the proposed franchise was changed so as to

grant a perpetual franchise and an exclusive franchise for a period of 30 years, as an opinion and conclusion of the witness.

Int. 32. So that, if I understand you correctly, what you told the Council you had done and intended to do, was to modify the Indianapolis ordinance, so as to make it perpetual and exclusive for 30 years, and they assented to that?

Objected to on the part of the respondent as being immaterial, irrelevant, incompetent, and calling for the opinion and conclusion of the witness and not a statement of facts.

Answer. That is what I told them and very emphatically, and they assented to it finally.

The complainant offers in evidence the following from the testimony of Dr. M. P. Turner, in the case of the Des Moines Street Railroad Company *vs.* the City of Des Moines and others, which was No. 3503 Equity, in the Circuit Court of the State of
2339 Iowa, in and for Polk County, and was afterwards appealed to the Supreme Court of the State, and reported in Volume 73 of the Iowa Reports, page 513, commencing at page 63 of the printed abstract, as follows:

"The first mile of track was finished and the cars running thereon, January 1, 1868. We constructed additional track every year thereafter; up to 1874, we had between two and three miles. The population of Des Moines, in 1870 was about six thousand. Not a single member of the company would have had anything to do with the enterprise had it not been for the provisions of the tenth section of the ordinance, which provided that we should have the exclusive right to operate street car lines upon the streets of the City of Des Moines for a term of thirty years from the time the first mile of track was laid, and that they would not grant to any other company or persons a right that would impair the rights of our company. Our company would not have accepted the provisions of the ordinance, or expended its money in the construction of those railway lines in the City of Des Moines had it not been for the provisions of section ten of the ordinance. The other persons interested with me in the Company were U. B. White, F. M. Hubbell and J. S. Polk. In March or April, 1869, Polk and Hubbell got desperately sick of their investment, and I had to buy them out. U. B. White went out in 1873. He said he couldn't stand it any longer, and that I must let him out. I told him I didn't have the money. He said he would take property, and I finally traded him property for his stock, and that stock went to my wife. The amount of money expended in the construction of the railway line of the company up to and including 1874, amounted to between forty and fifty thousand dollars. I knew of the enactment of the ordinance in 1874, and we proceeded thereafter to continue the work of improving and extending the lines of the company and its railroad tracks. We relied upon the good
2340 faith of the City in observing their contract. In the construction of the extensions made after the year 1874, we relied upon the confirmation of the provisions of section 10 of the ordinance, as re-enacted in 1874. We also knew of the re-enactment of

this street railway ordinance in 1879. We looked upon this as a re-confirmation of what the City had done before. The company proceeded upon faith in this re-enactment of the ordinance to expend additional money, and continued to extend their tracks up to the time the Company sold out to the present plaintiff in this suit; expending from sixty to seventy thousand dollars after the re-enactment of the ordinance of 1879, and about twenty-five thousand dollars between 1874 and 1879.

In the estimate I have made of the money expended in the extension and improvement of the street railway lines of the company I have not included anything for my own time and services given during all these years. The Des Moines Street Railway Company did not pay me anything for my services, nor any other official. This was because my wife and I owned all of the stock of the Company. In the estimate I have given of the cost of the road and the amount expended upon it, none of this time of myself or wife is included. My own services rendered to the company were worth at least the sum of three thousand dollars per annum. The Des Moines Street Railway Company would not have continued the expenditure of money in extending its tracks and improving its service and increasing its rolling stock and other equipments, except upon the faith of the confirmation and re-confirmation of the provisions of section 10 of the ordinance of 1866. Much of the time when we were making these improvements we could not have sold the stock for ten cents on the dollar. In the operation of the Des Moines Street Railway, the receipts never paid the operating expenses in any one year until 1882. We operated the line of the com-
2341 pany for fourteen years before we received enough to pay for its operating expenses, and during all of this time we ran behind, and in this estimate, as in the former one, I have not estimated anything for my own services, or those of my wife. In 1882, we made two thousand dollars above operating expenses. In 1883, nothing. In 1884, Eight thousand dollars, and in 1885, about ten thousand dollars. None of these estimates included anything for my own time or that of my wife. From 1883, down to the present time, my wife has been helping me all of the time. She was the Secretary of the Company, and for the last few years took entire charge of that work, including the handling of the daily receipts of the cars, and the paying of the bills and the keeping of the accounts. In the estimate of the running expenses of the road, I have simply considered the difference between the expenses of operating the road and the receipts from the operation of it, not counting anything for myself or wife. I gave my entire energies to the road during all of these years, and the last few years my wife devoted her entire time to it. I was not engaged in any other business at any time, and this business took my entire time. The Company paid into the City Treasury three per cent. of its net earnings. This amounted in all to about six hundred dollars, including 1885. The Company did a great deal of paving between the rails of its tracks, all of which has been

done since January 1, 1882. "The Company has expended for paving alone in the neighborhood of ten thousand dollars."

Also the following from page 67:

"In the extension of our lines we tried, to the best of our knowledge, to extend them in the direction in which the population was centering, and the extensions were made with the view of reaching the portions of the City that demanded railroad facilities. I don't know any section of the city that demanded street railroad
2312 facilities where they were not furnished. I have always been ready to extend the lines as fast as they would pay running expenses. I said again and again, "Gentlemen, I do not want interest on the money, but if the extension will only pay running expenses, I am willing to go anywhere, any place." The trouble was the extensions were made too rapidly, and the lines did not pay."

It is admitted that M. P. Turner, from whose testimony, in the case of Des Moines Street Railroad Company *vs.* the City of Des Moines and others, the foregoing extracts have been read, is dead.

Respondent objects to the offer of the evidence of M. P. Turner, because the same is immaterial, irrelevant and incompetent. The case in which the testimony was given, not being a case between the same parties, nor involving the same issues as the case at bar.

For the further reason, the evidence is offered from an abstract of the testimony of the said M. P. Turner as given in that case, and not from the original notes as taken on the trial, or from a transcript of said original notes.

It is admitted that the extracts read were read from the printed abstract of the record filed in the Supreme Court of Iowa, by the appellant in the case of the Des Moines Street Railroad Company, appellant, *vs.* the City of Des Moines, and others, appellees it being a part of the record upon which said cause was heard and determined.

2313 Int. 33. Mr. Polk I want to call your attention to Exhibit No. 13, an opinion by Mr. Gabisha Parsons, and a memorandum by yourself following it, and I wish you would state how the original of this opinion came into your possession finally, Mr. Polk?

Objected to on the part of the Respondent as being immaterial, irrelevant and incompetent.

Answer. This opinion came into my possession after the consolidation, or at the time of the consolidation, when the papers of the Des Moines Street Railroad Company were turned over to the consolidated company, or to the Company after consolidation.

Int. 34. Now, following the opinion of Mr. Parsons, there is a memorandum upon the original opinion which is all written with pen and ink, signed by J. S. Polk, is that in your handwriting, Mr. Polk?

Answer. That is; both the body and signature.

Int. 35. When was that memorandum made by you there, with

reference to the time when the Des Moines Street Railroad Company purchased the property of the Des Moines Street Railway Company, July 1st, 1886, before or after that?

Respondent interposes same objection as last above made.

Answer. Before.

Int. 36. And at whose instance or request; do you remember who submitted the matter to you?

Respondent makes the same objection as last above.

Answer. I do. It was submitted to me by Mr. Frank Sherman and Walter McCain, who were then negotiating for the purchase of the property of Dr. Turner.

2344 Int. 37. Please state whether you know the signature of Galusha Parsons, and if so, whether his signature to the opinion referred to is genuine?

Answer. I know his signature and I know the signature appended to that opinion is genuine.

Int. 38. Who was Mr. Parsons, Galusha Parsons?

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, having no connection with the controversy.

Int. 39. What was his profession; where did he live?

Respondent interposes same objection as last above.

Answer. He lived in Des Moines and was a practicing lawyer here for quite a while, and is now practicing at Seattle, I believe.

At this time, 12 o'clock, noon, an adjournment was taken until 2 o'clock P. M.

MARCH 5, 1904—2 o'clock P. M.

Pursuant to the adjournment, the further taking of testimony was resumed as follows:

JEFFERSON S. POLK, being recalled, and *cross-examined* by William H. Bremner, testified as follows:

C.-int. 1. Mr. Polk, how many members were there on the City Council of the City of Des Moines, in 1886, at the time the Turner Ordinance was passed?

Answer. I think the record would tell you better than I can tell; I think there were twelve.

C.-int. 2. Do you re-call any of them, and who were they?

Answer. Yes; I can call some; they were all in the City limits. I think Ira Cook was one of them, and Cleveland was Mayor—I would have to refresh my recollection.

2345 C.-int. 3. That is all you remember?

Answer. Yes.

C.-int. 4. Who were the members of this committee to whom this ordinance was referred, and before whom you say there was some discussion?

Answer. I can't say there was any committee appointed; I don't

believe I did say so, further than this: that it was either a committee or committee of the whole and the entire body of the council.

C-int. 5. This argument to which you refer took place before the committee of the whole, or council?

Answer. Before the council and before the committee of the whole and before a smaller committee if there was one; I have no recollection about a smaller committee.

C-int. 6. Have you any definite recollection as to whether this argument to which you refer took place before the council or the committee of the whole?

Answer. I recollect distinctly before the council; whether they called it committee of the whole or not, I don't know.

C-int. 7. Where was the council then meeting, holding its sessions?

Answer. I think it met in what we then called the Sherman Block, down at the corner of Court Avenue and Third Streets; that was about the only decent building we had then, and I think it was in the second story.

C-int. 8. How long before this Turner Ordinance was finally passed was it first presented to the Council?

Answer. I won't undertake to say, but the records will show. I think it was under discussion for a month anyhow?

C-int. 9. You don't remember?

Answer. No, sir.

5346 C-int. 10. How many times was it argued before the Council, or were arguments presented before the council on it?

Answer. To undertake to say how many times, I can't; I can only say it was before the council quite a number of times.

C-int. 11. Who argued it or presented or represented the interests of the City in the argument?

Answer. The city Attorney was there.

C-int. 12. Who was he?

Answer. I don't recollect now; and various members of the council. I think it was a pretty general discussion by all of the members of the council and myself.

C-int. 13. Do you recall what any member of the council had to say upon it?

Answer. No sir.

C-int. 14. Do you recall what the City Attorney said to say?

Answer. No, sir, not the words; I can't give you anything particular; forty years is a good long while to remember. I know, Mr. Brenner it was discussed and very earnestly discussed by both sides, and we fought over it. I think it was a month, may be six weeks.

C-int. 15. The whole ordinance was fought over, was it?

Answer. Yes, sir. You have probably gone through the same thing down there at the City Hall; you know how the thing goes.

C-int. 16. Now, Mr. Polk do you recall what discussion there was had as to section 2, which provided that such cars to be used upon such tracks shall be operated with animal power only, and shall not

connect with any other railway upon which such cars are used; do you recall what discussion there was as to that?

Answer. I don't know that I understand your question fully. If you ask me to tell what was said on that subject, I will
2347 say that I don't recall it.

C-int. 17. Do you recall what was said as to section 4, which is the section which requires that the tracks shall be laid so as to conform to established grades of the street?

Answer. I know we discussed that question.

C-int. 18. Do you remember what was said about it?

Answer. What was said I don't know and won't undertake to give. I can't recollect it.

C-int. 19. Do you remember what was said in reference to section 5, which provides that the City shall not be held liable——

Answer. You might ask about every section. I don't remember any discussion on any special question, except generally, that the matter was gone over with and discussed, and finally the result of the discussion was put in the ordinance.

C-int. 20. Your recollection is simply a general recollection that the ordinance was discussed?

Answer. My recollection is, it was discussed very energetically, and the result of the discussion was agreed upon and embodied in the ordinance. Now, that is about all I can recollect about it. I don't know that anybody has a memory to go back forty years and undertake to narrate the particular language used in that discussion.

C-int. 21. Did these discussions take place at a meeting of the council or were they discussed with the individual members?

Answer. The discussion that I remember was at the meeting of the council or the committee. I may have talked with the individual members about it.

2348 Redirect examination.

By N. G. Guernsey, Esq:

R. C-int. 1. Mr. Polk, in saying that you remember that there was a discussion there and do not remember the language used, do you mean to have us understand that you have no recollection as to whether the duration of the right was discussed?

Answer. I have a recollection that everything that was agreed upon and put in that ordinance was discussed. I remember the duration of the right very distinctly, was discussed. I remember the question of its being exclusive was discussed and fought over. Those were questions that were very much in dispute. I remember very well, the result of the discussion was that these things were agreed upon and it was acceded to and agreed that that ordinance shall be perpetual; that we wouldn't undertake it unless it was, and that it must be exclusive for 30 years, in order to protect us against loss in building and operating the road.

Recross-examination.

By W. M. Bremner, Esq:

R. C.-int. 1. The whole result of that discussion was an agreement which was embodied in the ordinance itself, was it not?

Answer. Yes; or aimed to be at least. The time of that discussion I cannot remember; I think it was several weeks, probably as much as two months. I know it was up at every meeting of the council; we would get along a section at a time and agree to it, and then we would have a fight over something else. Who spoke and who didn't speak, I can't tell, but I know that the council did take a hand in it, and so did I.

2349 Complainant offers in evidence "Number 41" from the Revised Ordinance of the City of Des Moines of 1869, page 171, as follows: "An Ordinance Adopting the Revised Ordinances of 1869, and providing for the Publication thereof."

"Sec. 1. Be it Ordained by the City Council of the City of Des Moines: That the foregoing Ordinances revised by order of the Council, numbered from 1 to 41, inclusive (and including this Ordinance) be and are hereby adopted as the Revised Ordinances of the City of Des Moines, and shall be known as the Revised Ordinances of 1869, and there are hereby ordered printed one thousand copies in pamphlet or book form, with an index and marginal notes, together with the laws of the State on the subject of municipal Corporations, and a list of the officers of the City, and the proceedings for the abandonment of the City Charter.

Sec. 2. All Ordinances or parts of ordinances conflicting with any of the provisions of these Revised Ordinances of 1869 are hereby repealed, and all ordinances of a general character adopted prior to these Revised Ordinances and not included herein, are hereby repealed, and these Revised Ordinances contain all the ordinances of a general character in force or effect at and from their passage and publication in the manner provided by the laws of the state.

Complainant offers in evidence ordinance "Number 28" entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and Along the Streets of the City of Des Moines," from the Revised Ordinances of the City of Des Moines, of 1869, from which Number 41 has just been offered.

It is stipulated that the said ordinance, "Number 28" of the said Revised Ordinances of 1869, of the City of Des Moines, is what is known as the Turner Ordinance, which was originally passed

2350 December 10, 1866.

Complainant also offers the Title Page of the Revised Ordinance of 1869 in evidence, from which 41 and 28 have just been offered, as follows: "Revised Ordinances of 1869 of the City of Des Moines, and the Laws of the State for the Incorporation of Towns and Cities, Published by Authority of the City Council of Des Moines. Mills & Company, Steam Printing & Publishing House, 1869."

Complainant offers in evidence Exhibit No. 14, it being an Ordinance to amend section 9 of the Turner Ordinance, the said amendment having been passed September 5, 1870.

461

Respondents do not object on the ground that it is a copy, but reserve the right to compare with the original certification, and if it shall be found that it is not a correct copy, respondent reserves the right to make such objections as could be made.

Complainant offers in evidence Exhibit No. 15, being a record of the acceptance of the ordinance, Exhibit No. 14.

Complainant offers in evidence Exhibit No. 16, being an ordinance passed February 5, 1872, and referred to in paragraph 5 of the Bill.

Complainant offers from the printed copy of the Revised Ordinances of the City of Des Moines, revised and arranged by order of the City Council, of 1874, commencing on page 220, the following:

"Number 63.

An Ordinance Adopting the Revised Ordinances which have been revised and arranged by M. H. King, Taylor Pierce and John
2351 R. Rollins, a committee appointed by the City Council of the City of Des Moines, to revise, arrange and superintend the publication of the ordinances of the said City of Des Moines, and to provide for the publication of the same.

SEC. 1. Be It Ordained by the City Council of the City of Des Moines, Iowa: That the foregoing ordinances, revised and arranged by M. H. King, Taylor Pierce and John R. Rollins, a committee appointed by the City Council of the City of Des Moines, Iowa, to revise, arrange and superintend the publication of the ordinances of said City, numbered and entitled as hereinafter described in these ordinances, namely:

Number 1.

An Ordinance to organize the City of Des Moines as a City of the first class, providing for the election, defining the duties and fixing compensation of certain City Officers. * * *

Number 31.

An Ordinance Authorizing the Construction and operation of certain street railroads in and along the Streets of Des Moines. * * * * be and the same are hereby adopted and declared to be the Municipal Law of this City, including this ordinance, and shall be known as the Revised Ordinances of 1874, in force in said City, and the same are hereby ordered to be herewith printed and published in book form under the superintendence of said committee, and the said ordinances thus printed shall be received in evidence without other or further proof, and said committee are authorized to have three hundred copies of the same printed as herein directed, with a list of the City Officials from the organization of the City of Des Moines as a City, in 1857, to 1875, rules and order of business for the government of the City Council in its legislative capacity, charter of the Town of Ft. Des Moines, approved in January,
2352 1853, certificate of County Surveyor who laid out the original town of Ft. Des Moines, the commissioners deed of said origi-

nal town, acknowledgment of the Clerk of the District Court of Polk County, Iowa, of the same, special charter or act of incorporation of the City of Des Moines, acts of the extra session of 1862 on abandonment of City Charters, proceedings of the City Council to abandon special charter, legalizing act of 1868, Laws of Iowa, Code 1873, with reference to cities and incorporated towns and Governor's statement declaring the City of Des Moines to be a City of the first class, acts of the 15th General Assembly affecting Cities and Towns, all of which are hereby recognized and adopted as of equal validity with said Revised Ordinances of 1874, including the index and marginal notes herein contained.

SEC. 2. That the foregoing ordinances contained in this revision shall constitute all the ordinances of a general character that remain in force after the passage and publication of the same, as provided in section one of this ordinance.

SEC. 3. All ordinances of a private or special character heretofore passed, the objects of which have been accomplished, or which have expired by limitation, or have been forfeited by nonuser, are not included in these revised ordinances, and all ordinances granting privileges, or which have expired after a term of years, shall not be enlarged or abridged by their incorporation into these revised ordinances, but shall cease to be in force at the time and under the conditions or circumstances as provided in the original ordinances, and all ordinances whereby any privilege or any franchise has been heretofore granted and which are not included in these revised ordinances, are hereby repealed.

SEC. 4. Actions or proceedings pending and rights accrued, and liabilities incurred prior hereto, under the ordinances here-
2353 tofore in force in behalf of or against the City, shall not be affected by any change in the ordinances of the City made by these Revised Ordinances of 1874.

SEC. 5. This ordinance shall take effect and be in force upon its passage and publication in the Daily Iowa State Register, a newspaper published in the City of Des Moines, Iowa."

Complainant also offers in evidence from the said printed copy of the Revised Ordinances of the City of Des Moines, from which the offer last made was taken, "Number 31," entitled, "An Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines.

It is stipulated that Number 31, just offered is the Turner Ordinance of December 10, 1863, as modified by amendments prior to the Revised Ordinances of the City of Des Moines of 1874.

Complainant offers in evidence Exhibit No. 17 being an ordinance, entitled "An Ordinance to Authorize the Des Moines Street Railway Company to use steam, horse or other animal power, such as is used on street railways and acceptable in other cities in the operation of their street railroads."

Respondent, objects to Exhibit No. 17, as incompetent, and not the best evidence, not being properly certified to by the Clerk; not being shown that it is an ordinance of the City of Des Moines, or that it was an ordinance of the City of Des Moines.

Complainant offers, from the book entitled, The Revised Ordinances of the City of Des Moines of 1879, Published by Authority of the City Council, from page 238, the following:

2354 "CHAPTER 63. An Ordinance Adopting the Revised Ordinances of 1879.

O. 185. P. October 6, 1879.

SEC. 1. Be it Ordained by the City Council of the City of Des Moines: That the following ordinances, revised by order of the City Council, by I. A. Hammer, and N. K. Davis, numbered from Chapter 1 to 63, inclusive (and including this ordinance) be and they are hereby known as the Revised Ordinances of 1879, and are and shall be entitled as hereinafter described in these ordinances, namely:

CHAP. 1. Of Boundaries and Seals; being ordinance describing the seals and wards and boundaries of the City. * * *

CHAP. 17. An Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines. * * *

SEC. 5. This ordinance shall take effect and be in force from and after its passage and publication according to law."

Complainant also offers from the said Book, entitled, "The Revised Ordinances of the City of Des Moines of 1879," Chapter 17, on Street Railways, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines."

It is stipulated that Chapter 17, just offered, was the Turner Ordinance, passed December 10, 1866, with such modifications as have been made by amendments in force at the time the Revised Ordinances of 1879 were adopted.

Complainant offers in evidence Exhibit No. 18, being a resolution passed August 1st, 1881, directing the Street Railway Company to make certain repairs.

2355 Complainant offers in evidence Exhibit No. 19, being an ordinance, entitled, "An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of North Des Moines," which was passed May 9, 1885.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent; the town of North Des Moines having ceased to exist as a corporation on or about the year 1890, and having been merged or consolidated with the City of Des Moines; and for the further reason that whatever rights the Des Moines City Railway Company now has in the streets of that part of the City formerly known as the town of North Des Moines, must be by virtue of the City of Des Moines; further, said ordinance, or purported ordinance is not and was not a valid and legal ordinance at the time it was passed, or at any time since, for the reason that the title of the ordinance does not contain a correct statement of the subject of the ordinance. No objection is made upon the ground that the ordinance offered is a copy of the original.

Complainant offers in evidence a resolution of the Council of the City of Des Moines, passed June 22, 1885, relative to tracks on Woodland Avenue, between Fourteenth and Sixteenth Streets, being Exhibit No. 20.

Respondent reserves the right to object to all these offers of copies of City Records, unless the certification thereof is made complete by the attaching of the seal of the City Clerk, except where the objection to the copy is expressly waived.

2356 Complainant offers in evidence Exhibit No. 21, being copy of a record of January 18, 1886, showing the introduction of ordinance authorizing the Des Moines Broad Gauge Street Railway Company, to construct and operate a Street Railroad.

Complainant offers in evidence Exhibit No. 22, being resolution of March 22, 1886.

Complainant offers in evidence Exhibit No. 23, passed April 27, 1886, directing the City Solicitor to report whether in his judgment the horses could be required to travel inside of the rails.

Complainant offers in evidence Exhibit No. 24, being record of the Council Proceedings, April 27, 1886.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent; it being merely an expression of an opinion of a committee of the Council and does not purport to be an action of the City Council. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Council Record of June 29, 1886, marked Exhibit No. 25, showing the passage of the Broad Gauge Ordinance.

Complainant offers in evidence Exhibit No. 26, being an ordinance passed June 29, 1886, entitled "An Ordinance Authorizing the Des Moines Broad Gauge Street Railway Company to construct and Operate Street Railways in the City of Des Moines, and defining the powers and duties of said Company."

2357 Complainant offers in evidence Exhibit No. 27, being acceptance of the foregoing ordinance by the grantee named therein.

Complainant offers in evidence deed from the Des Moines Street Railway Company, to the Des Moines Street Railroad Company, for certain lots, dated July 1, 1886, and recorded in Book 178, at page 487 of Polk County Records, being marked Exhibit No. 28.

Complainant offers in evidence Exhibit No. 29, it being a conveyance from the Des Moines Street Railway Company to the Des Moines Street Railroad Company of certain Street Railroad property in the City of Des Moines, and Street Railroad Franchise in the incorporated town of North Des Moines, dated July 1, 1886, and recorded in Book 171, page 151.

The offer is objected to on the part of Respondent as being incompetent, in so far as the instrument purports or pretends to convey the interest of the Des Moines Street Railway Company, in that its right to occupy and use the streets of the City of Des Moines and the town of North Des Moines, under and by virtue of the ordinance of said City, for the reason that said franchise rights are not trans-

ferrable in the manner and style herein attempted. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 30, it being an instrument executed July 1, 1886, by M. P. and M. A. Turner, relative to the capital stock of the Des Moines Street Railway Company.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent. No objection is made on the ground
2358 that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 31, being resolution passed July 6, 1886, granting to the Broad Gauge Company rights on Des Moines Street.

Complainant offers in evidence Exhibit No. 32, it being an ordinance, entitled, "An Ordinance Authorizing the Broad Gauge Street Railway Company to construct and Operate Street Railways in the incorporated Town of North Des Moines, passed July 6, 1886."

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent; the ordinance in question being an ordinance of the Town of North Des Moines, and whatever rights the Des Moines Broad Gauge Street Railway or the Des Moines Street Railway Company may have acquired thereunder, ceased and determined at the time of the consolidation of the town of North Des Moines with the City of Des Moines.

Complainant offers in evidence Exhibit No. 33, being a record of a notice as to Locust Street Bridge, dated July 26, 1886.

Objected to on the part of Respondent as being immaterial.

It is hereby stipulated that at the time of the record just offered, the City of Des Moines was divided, as it then existed, by the Des Moines River into two portions, one of which was commonly called West Des Moines, and the other East Des Moines, and that
2359 Locust Street and the Bridge across the Des Moines River on Locust Street, constituted one of the main thoroughfares between the two portions of the said City.

The Respondent, while admitting the fact, objects to the admission as immaterial and irrelevant.

Now, at 4 o'clock P. M., an adjournment was taken until March 7, at 9 o'clock A. M.

MARCH 7TH, 1906—9 o'clock A. M.

Pursuant to the adjournment, the testimony on the part of Complainant is resumed as follows:

Complainant offers in evidence Exhibit No. 34, the same being a resolution of August 16, 1886, granting to the Broad Gauge Company rights on Sycamore Street.

Objected to on the part of Respondent as immaterial and incompetent, it appearing on the face of the resolution that it was not passed by the Council; for the further reason, that if it had been passed, the City Council has no power to grant, and had no power to grant permission for the building and operating of a street railway along any street of the City of Des Moines, by resolution. No objection is made on the ground that the Exhibit is a copy.

It is stipulated that the street sometimes referred to as Sycamore

Street, is now known as Grand Avenue, and that where
2360 streets are referred to as east, the reference is to a street or portion of street east of the Des Moines River; and where it is referred to as West; the reference is to a street or portion of street west of the Des Moines River.

Complainant offers in evidence Exhibit No. 35, the same being a record of August 17, 1886, of the introduction of the first ordinance attempting to repeal the Turner Ordinance.

Complainant offers in evidence Exhibit No. 36, being resolution of August 20, 1886, granting to the Broad Gauge Company rights on East Sycamore Street, from East Twelfth Street to the east corporation line.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, for the reason that the City Council has no power nor right to grant privileges of the kind attempted to be granted in said resolution, by resolution. No objection is made on the ground that the Exhibit is a copy.

Complainant offers in evidence Exhibit No. 37, being resolution of the City Council, passed September 14, 1886, granting to the Broad Gauge Company rights on West Fourth Street, from Locust to Court Avenue.

Respondent interposes the same objection as last above made. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 38, being resolution of the City Council, passed September 14, 1886, granting to the Broad
Gauge Company rights upon 6th Street, West Des Moines,
2361 from Vine Street to School.

Respondent interposes same objection as made to Exhibit No. 36. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 39, being what has been referred to as the first repealing ordinance, an ordinance entitled, "An Ordinance to Amend an Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines," passed December 10, 1866, and amendments thereto, passed February 5, 1872.

N. T. GUERNSEY, of lawful age, being duly sworn, examined in chief by W. L. READ, Esq., testified, as follows:

Int. 1. State your name.

Answer. N. T. Guernsey.

Int. 2. Calling your attention to Exhibit 39 you may state what knowledge you have with respect to whether that ordinance was ever accepted by the Des Moines Street Railroad Company?

Objected to on the part of Respondent as being immaterial, incompetent, the witness not having shown that he was in a position to know.

Answer. Prior to July 1, 1886, the firm of Kauffman & Guernsey, of which I was a member, had been attorneys for the Des Moines Street Railway Company, and after that time we were attorneys

for the Des Moines Street Railroad Company during its controversy with the Des Moines Broad Gauge Street Railway Company and the Electric Company, including the period when this ordinance was passed, and I was at that time familiar with all these transactions, and I know
2362 that the Des Moines Street Railroad Company never accepted this ordinance.

Respondent moves to strike the answer of the witness as being incompetent, immaterial, the witness has not shown a sufficient connection with the Company to be able to testify whether the Company ever accepted it or not.

Int. 3. You may state what the records of the City Council show in that respect?

Objected to on the part of Respondent as not being the best evidence.

Answer. The Original records I have not examined. I have examined certified copies of the records, and I have never seen any copy of any record of any acceptance of this ordinance. But there are copies of the records which will be introduced here that show that the City itself stated that the Company had declined to accept the ordinance. And I think also, for that matter, though I am not sure about this, I think in the case that has been referred to already, of the Des Moines Street Railroad Company *vs.* the City of Des Moines and others, involving similar transactions on what was then known as West Sycamore Street, and now called West Grand Avenue, as well as other matters, the City expressly set up in its answer that this ordinance had been passed and claimed we were bound by it. Those matters will also be shown by the records.

Respondent moves to strike out the answer of the witness as being incompetent, and not the best evidence.

2363 Cross-examination.

By WM. H. BREMNER:

C.-int. 1. You were not an officer of the Street Railway Company during the period to which you have referred in your direct examination, when the firm of Kauffman & Guernsey were attorneys for the Street Railway Company?

Answer. No, I was not.

C.-int. 2. You have never examined the original records of the Council for the purpose of ascertaining whether any acceptance was ever filed or not?

Answer. I have not.

[SEAL.] (Sgd.) N. T. GUERNSEY.

Subscribed in my presence and sworn to before me by the said N. T. Guernsey this 17 day of September, 1906.

(Sgd.) J. P. BLAISE,
Examiner and Notary Public in and for Polk County, Iowa.

It is admitted that on the 18th day of September, 1886, the Des Moines Street Railroad Company filed its petition in the Circuit Court of the State of Iowa, in and for Polk County, in the suit entitled, Des Moines Street Railroad Company *vs.* Des Moines Broad Gauge Street Railway Company wherein the Des Moines Street Railroad Company asked for an injunction against the defendant, enjoining it from constructing its tracks upon certain streets therein named, this being one of the suits in which the opinion of the Supreme Court of Iowa was filed, which is reported at page 513, Volume 73 of the Iowa Reports.

Complainant offers in evidence Exhibit No. 40, being report of the City Solicitor upon a resolution relative to requiring street railroad companies to give notice when they proposed to tear up the streets and so on.

2364 Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 41, being resolution passed October 4, 1886, suggesting the question as to whether the Street Railroad Controversy in the streets hadn't reached the point where the Mayor had better intervene with the police force.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 42, being resolution of October 4, 1886, granting to the Broad Gauge Company rights on east Locust Street, from 5th to 6th street, and from 6th to 7th street.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council having no power to grant permission for the construction of a street railway by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 43, being resolution dated October 5, 1886, recorded in Book M, page 161, and the report of the City Solicitor; the resolution granting to the Broad Gauge Company rights on East Locust Street between 5th and 7th streets.

Respondent interposes the same objection as last above made. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 44, it being the petition filed in the Circuit Court of the State of Iowa in and for Polk County, in the case of Des Moines Street Railroad Com-

2365 pany against the City of Des Moines, J. H. Phillips, Mayor, and A. H. Botkins, City Marshal, being No. 3503 Equity in said Court.

It is admitted that this petition was filed October 12, 1886, and that "Exhibit A" to said petition was a copy of the Turner Ordinance, passed December 10, 1865, with such amendments as had been made to it up to the time that the said petition was filed, the ordinance as enacted on December 10, 1866, being "Exhibit A" to the Bill in the suit in which this testimony is being taken, and that "Exhibit B" to the said petition is the acceptance of the said ordinance of December 10, 1866, which is set out in paragraph 4 of said bill.

Respondent objects to the offer as immaterial, irrelevant and incompetent, the case in which the petition now offered in evidence was filed, not being a controversy between the same parties, and not

involving the same issues. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 45, it being the answer of the defendant in the said cause of the Des Moines Street Railroad Company against the City of Des Moines, *et al.*

It is admitted that the said answer was filed October 20, 1886, and that "Exhibit B" to the said answer was a copy of the ordinance, called the first repealing ordinance, passed September 16, 1886, a copy of which has been offered in evidence as Exhibit No. 39.

Respondent interposes the same objection as last above made, and the same waiver as to copy.

2366 It is admitted that in the said cause of the Des Moines Street Railroad Company against the City of Des Moines and others, the said Circuit Court of the State of Iowa in and for Polk County, on or about the 6th day of November, 1886, entered its decree in words and figures following, to-wit:

"Now, this day, to-wit, the 6th day of November, 1886, this cause came on for final hearing, the plaintiff appearing by Messrs. Nourse, Kauffman & Guernsey, and Parsons & Perry, its attorneys, and the defendants by James H. Detrick, their attorney, and the court, after an examination of the pleadings, hearing the proof and argument of counsel, and being advised in the premises, finds that the equities are with the defendants, and that the plaintiff's prayer should be denied and the bill dismissed.

It is therefore ordered, adjudged and decreed by the court, that the plaintiff's bill be dismissed, and that the defendant have and recover of the plaintiff the costs herein, taxed $8——, and that execution issue therefor; to all of which the plaintiff at the time duly excepted."

It is admitted that on or about the 31st day of December, 1886, the plaintiff in the said suit of the Des Moines Street Railroad Company against the City of Des Moines and others, appealed to the Supreme Court of Iowa from the said decree entered November 6, 1886, in the said cause, and that the said case is one of the cases in which the said Supreme Court rendered the opinion which is reported in the 73 Iowa on page 513.

2367 The Respondent, while admitting the fact, objects to the admission as being immaterial, it not being a controversy involving the same issues as the case at bar, or between the same parties.

It is also admitted that the decree of the Supreme Court of Iowa, which is set out in paragraph 10 of the bill in the case in which this testimony is taken, is the final decree rendered by the said Supreme Court in the said case of the Des Moines Street Railroad Company against the City of Des Moines *et al.*

The Respondent while admitting the fact, objects to the admission as immaterial and incompetent, the decree not having been rendered in a controversy between the same parties as the suit at bar, or in a case involving the same issues.

Complainant offers in evidence Exhibit No. 46 the same being a resolution passed by the City Council of the city of Des Moines,

October 15, 1886, recorded in Book M, page 185; and granting to the Broad Gauge Company rights on a large number of streets.

Objected to on the part of Respondent as immaterial and incompetent; for the further reason that the City Council has no power or right to grant permission for the use of the streets of the City of Des Moines for street railway purposes, by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 47, the same being a resolution of the City Council of the City of Des Moines, dated October 21, 1886, recorded in Book M, page 192, purporting to
2358 grant to the Broad Gauge Company rights in a number of streets there designated.

Respondent interposes the same objection as to the last previous offer. No objection is made on the ground that the exhibit is a copy.

It is admitted that on the 22nd day of October, 1886, the Des Moines Street Railroad Company filed its petition in the suit of the Des Moines Street Railroad Company against the Des Moines Broad Gauge Street Railway Company, in the Circuit Court of the State of Iowa, in and for Polk County, No. 3505 Equity, setting up that the defendant company was threatening to lay its tracks on Sycamore Street, from 9th street to 12th street, paralleling the lines of the plaintiff company, and asking for an injunction and that this is one of the cases in which the Supreme Court of the State of Iowa filed the opinion which is reported in the 73 Iowa at page 513.

Respondent, while admitting the fact, objects to the admission as immaterial, incompetent, the case not being between the same parties as the case at bar, or involving the same issues.

Complainant offers in evidence Exhibit No. 78, dated November 1, 1886, recorded in Book M, page 212, being notice that the Broad Gauge Company had selected West 6th street, from Vine Street to School.

Objected to on the part of Respondent as being immaterial and incompetent. No objection is made on the ground that the exhibit is a copy.

2368 Complainant offers in evidence Exhibit No. 49, being notice from the Broad Gauge Company, November 1, 1886, Book M, page 243, accepting the rights granted on East Locust between 5th and 7th Streets.

Respondent interposes the same objection as last above. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 50, being a record of the meeting of the City Council, dated November 23, 1886, Book M, page 237, relative to the controversies on East Locust street between the two companies.

Which offer is objected to on the part of Respondents as immaterial, irrelevant and incompetent, the city council having no power to grant privileges such as are attempted to be granted in this resolution by resolution; further, that it is not a grant to the plaintiff in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 51, being a record of Council Meeting of the City of Des Moines, dated November 23, 1886, Book M, page 239, which among other things, grants additional rights to the plaintiff company.

Respondent interposes the same objection as to the last previous offer. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 52, of date, December 6, 1886, Book M, page 255, being an acceptance by the Broad Gauge Company on the west route.

2370 Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 53 being the opinion of the Supreme Court of Iowa, reported at page 513, of Volume 73 of the Iowa Reports, which was filed June 27, 1887.

Objected to on the part of Respondent as immaterial, and incompetent, the opinion in question not having been handed down in a case between the same parties as the case at bar, or in a case involving the same issues. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 54, being copy of record of August 15, 1887.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence the Supplemental Opinion of the Supreme Court of the State of Iowa, in the two cases of the Des Moines Street Railroad Company against the Des Moines Broad Gauge Street Railway Company, and in the case of the Des Moines Street Railroad Company against the City of Des Moines, *et al*, commencing on page 524, of Volume 73 as follows:

"*Per Curiam*. A petition for rehearing has been filed in this case, and was fully argued at the last term. We have re-examined the case, and conclude that the petition for a rehearing must be overruled. It is proper, however, that we should say, in order to prevent any misconstruction of our opinion, that it was not our intention to hold, and it is not held, that the City is precluded by the ordinance under which the plaintiff is acting from availing itself of any improved street railway, to be operated by other than

2371 animal power, if reasonably necessary to meet the public wants. We did not regard such questions as in the case, and on that we express no opinion."

It is admitted that the supplemental opinion just referred to was filed on the 17th day of December, 1887, at the December Term, 1887, of said court.

Complainant offers in evidence Exhibit No. 55, being Council Record, December 19, 1887, of the City of Des Moines, Book M, pages 569 to 573 inclusive, granting certain electric rights to the Broad Gauge Company.

Objected to on the part of Respondent as being immaterial, incompetent, and for the reason that the City Council of the City of Des Moines has no power to grant by resolution rights, such as are attempted to be granted in the resolution offered; for the further reason, that whatever grant is made or attempted to be made by

said resolution is not a grant to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 56, being record of the City Council of the City of Des Moines, of December 20th, 1887, from Book M, page 575, showing among other things the introduction of the Broad Gauge Electric Ordinance, also showing passage of said ordinance.

Which offer is objected to on the part of Respondent as immaterial, and incompetent, the exhibit showing on its face that
2372 the meeting in question was not properly called, it being a so-called special meeting of the Council therefore, the ordinance in question was not properly passed; for the further reason that the grant attempted to be made in said ordinance was not a grant to the plaintiff in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence No. 57, being an ordinance, entitled, An Ordinance Authorizing the Des Moines Broad Gauge Street Railway Company to construct, maintain and operate by Electricity or other motive power other than animal or steam power, on any street *street* railroads in the City of Des Moines, and defining the powers and duties of said Company, passed December 20, 1887, this being the ordinance referred to in the preceding exhibit.

Objected to on the part of Respondent as being immaterial, incompetent, the ordinance shown in said exhibit never having been properly passed by the City Council of the City of Des Moines, as shown by the proceedings in Exhibit No. 56, and therefore not being an ordinance of the City of Des Moines; for the further reason, that the grant attempted to be made in said ordinance is not a grant to the plaintiff in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 58, it being the acceptance of the ordinance just offered by the Broad Gauge Company, dated January 2, 1888, found in Book M, page 583.

2373 Objected to on the part of Respondent, as not being an acceptance of any rights granted to the complainant company.

It is admitted that the case of Teachout *vs.* the Des Moines Broad Gauge Street Railway Company, which is reported at page 722, Volume 75 of the Iowa Reports, was commenced on the 4th day of February, 1888, by the filing on that day in the office of the Clerk of the District Court of Polk County, Iowa, of the agreed statement of facts upon which the said case was tried.

Complainant offers in evidence Exhibit No. 59, being a copy of an ordinance passed April 30, 1888, by the town of North Des Moines, entitled, "An Ordinance to Regulate and Control the Laying and Construction of Street Car Tracks, over across and upon the streets, alleys and bridges of the town of North Des Moines, Iowa.

Complainant offers in evidence the opinion in the case of Teachout against the Des Moines Broad Gauge Street Railway, being reported in the 75th Iowa, commencing at page 722, filed May 17th, 1888, which opinion is as follows:

2374 "This is a proceeding under section 3408 of the Code, by which the parties thereto presented to the court below an agreed statements of facts, and sought the determination of the question whether the Des Moines Broad-Gauge Street Railway Company has legal power and authority to operate street railroads in the city of Des Moines by electricity or other motive power other than animal power. The issue presented by the agreed statement of facts was in the nature of an action in equity, and the object was to enjoin the Broad-Gauge Street Railway Company from expending its money and resources in applying to said motive power to propel its cars upon its railroad tracks now constructed, and from constructing lines of road to be operated by said power. The Des Moines Street Railroad Company appeared and sought to intervene in the proceeding. The right to intervene was denied, and upon a final hearing there was a decree enjoining the defendant from equipping and operating its lines of street railway, now in the streets of the city, with electric or other motive power other than animal power, and from expending the funds and moneys of said company in the construction of other lines of street railway in said city to be so operated. The defendant appeals from this decree, and the Des Moines Street Railroad Company appeals from the order denying it the right to intervene in the proceeding.

Read & Read, for H. E. Teachout, appellant.

Parsons & Perry and Kauffman & Gurnsey, for the Des Moines Street Railroad Company, appellant.

Baylies & Baylies, for appellee.

"ROTHROCK, *J.*:

"I. This proceeding grows out of the litigation which originated between the Des Moines Street Railroad Company and the Des Moines Broad Gauge Street Railway Company, two rival 2375 street railways in the City of Des Moines. It is in fact another feature of the contention between said companies which was so elaborately considered by this court in the case of *Des Moines St. R. R. Co. v. Des Moines Broad Gauge St. Ry. Co.*, 73 Iowa, 513, and other cases. After the filing of the opinion on rehearing in the cases named, the city council, by certain resolutions duly passed, determined that the accommodation of the city, and the welfare of its inhabitants, required that improved motive power, other than animal power, and by which cars can be moved at an average speed of not less than eight miles an hour, should be used upon all broad gauge street car lines then in operation in the city, and upon all present and future extensions of said lines; and, by an ordinance passed by the council, authority was given to the Broad Gauge Company to change its motive power from animal power to electricity, or to such other motive power as may be found practicable to move its cars at the required rate of speed. These acts of the city council were done in pursuance of an application made by said railway company to the council. The plaintiff Teachout is a stockholder in the Broad Gauge Company, and is surety for it upon some of its indebtedness. He was active in procuring permis-

sion from the city council to the company to change its motive power. After the permission and authority were secured he instituted this proceeding, in which he claimed that the corporation in which he was a stockholder could not acquire any valid authority from the city council to operate a street railroad in said city by any propelling power. He was overruled by act of the corporation before this proceeding was commenced. The agreed statement of facts sets forth this matter of difference, and the question presented to the court for its determination was whether the city council had any power or authority to confer the right upon the company, in view of the decision of this court in the cases above cited.

The Des Moines Street Railroad Company, being what is
2376 known as the "Narrow Gauge Railway Company," appeared, and filed what was denominated a 'petition of intervention,' in which it was claimed that the proceeding was fictitious, and a fraud upon the rights of the Narrow-Gauge Company, and that it was not a real controversy between the parties, and demanded that it be dismissed. A motion was made by the parties to the proceeding to strike the petition of intervention from the files, for the reason, among others, that the cause had been submitted to the court for its decision, and that there was no right to intervene in the action, and make demands which would delay its determination. This motion was sustained, and the application to intervene was overruled; but, inasmuch as it had been suggested to the court that the controversy was not real and in good faith between the parties, it was ordered that the plaintiff and the officers of the Broad Gauge Company appear at a time named, and submit to an examination touching the question of good faith and the real nature of the controversy, and that the Des Moines Street Railroad should be permitted to appear, and examine the said parties touching the controversy, and to introduce other proof on said question material thereto. Thereupon an investigation was had, evidence was introduced, and the cause was submitted to the court, and at the same time, or about that time, another petition of intervention was filed by the Des Moines Street Railroad Company, in which a demand was made that it be allowed to intervene in the merits of the case. On the final submission the following orders were made:

"'This cause having been heretofore submitted to the court by and between the parties, upon the written submission and statement of facts filed with the clerk on the fourth day of February, 1888, and the court, being fully advised in the premises, finds that
the equities are with the plaintiff, H. E. Teachout. It is
2377 therefore ordered and decreed by the court that the defendant, the Des Moines Broad Gauge Street Railway Company, be restrained and enjoined from equipping and operating its lines of street railway, now laid in the city, with electric or other motive power other than animal power, and from expending the funds and moneys of said company in so equipping said line of road, or in constructing, for operation in said city, other lines of street railway, and that the costs of this proceeding be taxed against the defendant. The Des Moines Broad Gauge Street Railway Company excepts.

And the Des Moines Street Railroad Company is refused leave to file its petition of intervention, to which the said Des Moines Street Railroad Company excepts, and has five days in which to file its bill of exceptions.

MARCUS KAVANAGH, Jr., *Judge.*'"

"'Now upon this eleventh day of February, 1888, this cause coming on to be further heard upon the petition and motion of the Des Moines Street Railroad Company that the court decline to receive and determine this cause upon the submission and agreed statement of facts by the said Teachout and the said Des Moines Broad Gauge Street Railway Company, for the reason that there is no real controversy between said parties, but the same is a fraud upon both the court and the said Des Moines Street Railroad Company, pursuant to the order of this court made thereupon on the sixth day of February, 1888; and the said Des Moines Street Railroad Company appearing by its counsel, Galusha Parsons, and the said H. E. Teachout by his counsel, W. L. Read, and the said Des Moines Broad Gauge Street Railway Company by its counsel, R. N. Baylies, and the same having been taken under advisement: Now, upon this thirteenth day of February, 1888, it is ordered that the said petition and motion be, and the same are hereby, in all things denied; to which ruling and decision the said petitioner, by its counsel, in open court, duly excepted. And the said Des
2378 Moines Street Railroad Company having presented its petition for leave to intervene to the merits of the said submission, the said petition and motion are denied; to which ruling and decision the said petitioner, by its counsel, in open court, duly excepted. It is further ordered and adjudged that the said H. E. Teachout recover of and from the said Des Moines Street Railroad Company his costs of said proceeding, taxed at —, to which the said Des Moines Street Railroad Company duly excepted; and it is further ordered that, in the taxation of such costs, the clerk of this court will not tax, as a part thereof, any fees for the said Teachout, or the other officers of the said Des Moines Broad Gauge Street Railway Company.

MARCUS KAVANAGH, *Judge.*'"

"It will thus be seen that the court was of the opinion that the suggestion that the agreed statement of facts did not present a real issue between the parties, but was a fraud upon the court and upon other parties, was not well founded, and rendered a decree accordingly. We do not deem it necessary to review the evidence upon this question in detail. We are satisfied that the district court was correct in determining the proceeding ought not to be dismissed as fictitious. It is not claimed that a stockholder in a corporation may not maintain an action to restrain the corporation from acts in excess of its corporate power or authority. It is well settled that such an action will lie. *Sims v. Street Ry. Co.*, 37 Ohio St. 556; Cook, Stocks, secs. 672-674, and authorities there cited. The matter of difference which was submitted to the court was one of mere expediency as to the prosecution of the business of the corporation.

Counsel for the Des Moines Street Railway Company strenuously contend that the company they represent have the exclusive right to construct, maintain and operate street railroads in the city; and if their contention is correct, it would be a most flagrant
2379 violation of the corporate powers of the Broad Gauge Company to waste its substance, and involve its stockholders in a large expenditure of money, without legal authority to move a car upon the streets; and this was the very question which was presented to the court for its determination. And while it may be true that Teachout was active in his endeavors to save the property of the company, and prevent the great loss consequent upon the adjudged exclusive right of the Narrow-Gauge Company, it does not follow that he agreed with the officers and counsel of said company that the decision of this court precluded the company in which he was a stockholder from operating their lines by a motive power other than animal power. The record shows that, so far as his action as a director of the corporation was concerned, he opposed taking any corporate action to apply electric power to the lines of street railroad then owned by the company.

"11. Counsel for the Des Moines Street Railroad Company complain that it was not allowed to intervene in the proceeding. It is very clear that it had no right to intervene to defeat the action or proceeding. Section 2384 of the Code provides: 'The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay.' And in *Van Gordon v. Ormsby*, 55 Iowa, 657, it said that 'an intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony. If the person intervening has rights which require protection, and which cannot be determined in the main action without delaying the trial, he ought not to intervene, but should commence an original action, and, if need be, and a proper case therefor can be made, protect his interests by injunction.' Now, if the intervenor had presented a petition when its first appearance was made, and without setting up facts which must
2380 have unavoidably caused delay, and joined the plaintiff Teachout in the demand that the Broad Gauge Company be enjoined from applying electricity as a motive power upon its road, and upon the ground that the intervenor had the exclusive right to build, maintain and operate street railroads in the city, it may be that the petition for intervention should have been entertained by the court. But the record does not show that the court held that there was no right of intervention in any event. The refusal to permit the intervention upon the merits may well have been put upon the grounds that it was presented too late, and that it attempted to raise issues which would necessarily involve delay. As will be seen further in this opinion, the only question to be determined arose upon the ordinance and resolutions of the city council. It is true, the agreed statement of facts recited that the Des Moines Street-Railroad Company had failed to furnish efficient street-car service to the public, and this was denied in the petition

of intervention. But, in our opinion, this raised an immaterial issue, as will presently be seen; and the Des Moines Street Railroad Company is in no position to raise that question because the court below, in effect, with a recital of record before it, that the street-car service was inefficient, and with nothing to contradict or call in question the recital that the Narrow-Gauge Company had the exclusive right to maintain and operate street railroads in the streets of the city.

"III. We come now to the question of the power or authority of the Broad Gauge Company to operate its lines by electricity, or other improved or newly-discovered motive power. This question has been elaborately argued by the counsel above named, and by other counsel in behalf of the city and of North Des Moines and of the public generally. It is well to understand the precise point to be
2381 determined. As we view it, the power is undoubted, unless the Des Moines Street Railroad Company has such an exclusive right to construct, maintain, and operate street railroads in the city as to exclude all competition of other lines, whatever motive power may be employed by the other lines. In the cases already determined by this court, involving the rights of these rival companies, we determined that the exclusive right to furnish to the city of Des Moines its street railway service, for thirty years from the time the right accrued, was in the Narrow-Gauge Company. This statement would seem to include all street railways, as well *as* those operated by animal power as those operated by electricity, or by cables operated by steam or other power; and much of the argument in behalf of the Des Moines Street Railroad Company is founded upon the claim that this court, in the reasoning in the main opinion, regarded the right to exclusive street-car service without reference to the motive power used. The question then before the court was between two rival companies, both of which operated their lines by animal power. The question of the kind of street-car service was in no manner involved in the case. Those cases were contested, both upon the original submission and upon the rehearing, by able and distinguished counsel. We think it is safe to say that, upon the original argument of the case, the question as to the motive power was not in the mind of court or counsel. At least, it is undoubtedly true that no such question was presented to this court.

"In view of the general discussion of the subject in the original opinion, the following language was used in the opinion upon rehearing: 'It is proper, however, that we should say, in order to prevent any misconstruction of our opinion, that it was not our intention to hold, and it is not held, that the city is precluded,
2382 by the ordinance under which the plaintiff is acting, from availing itself of any improved street railway to be operated by other than animal power, if reasonably necessary to meet the public wants. We did not regard that question as in the case, and on that we express no opinion;' and the decrees in those cases do not require the Broad Gauge Railway Company to remove their railroad tracks from the streets. They are enjoined from operating

their lines of road by cars moved by animal power after the first day of May, 1888. This supplemental opinion and these decrees are a sufficient answer to the argument of counsel based upon the reasoning of the opinion in the cases cited. It was purposely left as an open question; and as the *personnel* of the court is now nearly the same as then, it is not improper to say that such was the intention of the court. It is proper to state that the ordinance authorizing the Broad Gauge Company to use electricity, or other motive power other than animal power, appears to us to be well guarded, so as to protect the rights of the Narrow-Gauge Company in the use of its lines already in operation, or other lines which it may desire to construct in the exercise of its exclusive right to the use of 'horse-cars.' And it seems to us that we must determine the rights of the parties by the record they have made, or, rather, by the grant of power given to them by the city council. This grant of power is found in the ordinance of the city which was enacted in June 1863; and that part of it — is necessary to be considered in determining this case is as follows: 'Section 1. Be it ordained by the city council of the city of Des Moines, that consent, permission and authority *is* hereby given and granted to and duly vested in the Des Moines Street Railroad Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches in, upon and
2383 along all the streets, and such alleys only fronting on which said company have depots, stables or car-houses, and over the bridges and such streets in the city of Des Moines, with their present and future extensions and connections; and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed. Sec. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this state shall be used upon any of said tracks. * * * Sec. 10. The right herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon; and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.'

"It seems to us, keeping in mind the fundamental rule that corporations are invested with such powers only as are expressly conferred upon them, and such other powers as are necessary to carry out those expressly granted, that there is little room for discussion or debate as to the powers conferred upon the Narrow Gauge Company by the ordinance. It has the exclusive right to operate its railway by animal power; and it has no more right to interpose objections to the building and operation of other street railroads, to be operated by other power, than if no grant of power had ever been made to it. The city, it is true, agreed, by section 10 of the ordi-

nance, that it would not 'confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.' It is strenuously 2384 contended that the granting of the right to operate other street cars will necessarily impair the rights of the Narrow-Gauge Company, by diminishing its revenue, which is derived from the carriage of passengers. Perhaps this argument is sufficiently answered by the thought that, when the city made the contract based upon this ordinance, the parties thereto were dealing with the known, and not with the unknown. It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of thirty years. If so, the establishment of hack-lines or omnibus-lines or other means of public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand. This ordinance and contract were made by the city in behalf of the public, and it should not be so construed as to fetter and prevent the right to use new methods and appliances, the result of the inventive genius of the age, or to apply the discovery and application of the latent powers of nature to the use of man. As well might the chartered owner of a rope ferry have insisted, years ago, that his exclusive right to that method of transportation pre- 2385 vented the right to charter a ferry propelled by steam when that element of nature was discovered as a propelling power. As sustaining these views, *see Saginaw Gas Light Co. v. City of Saginaw*, 28 Fed. Rep. 529; *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116.

"We think the decree of the district court should be reversed, and a decree will be entered in this court in accord with this opinion, or the cause will be remanded to the court below for that purpose.

Reversed."

2386 Respondent objects to the opinion as being immaterial and incompetent, the opinion in question not having been rendered in a case between the same parties as the case at bar, or in a case involving the same issues. No objection is made on the ground that the opinion is to be copied into the record.

Complainant offers in evidence Exhibit No. 60, being resolution of the City Council of the City of Des Moines, dated May 24, 1888, from Book M, page 83.

Complainant offers in evidence Exhibit No. 61, being record of the City Council of the City of Des Moines, of May 29, 1888, from

Book M, page 90, showing the introduction of the second repealing ordinance and a long resolution.

Complainant offers in evidence Exhibit No. 62, being the second repealing ordinance, passed June 1, 1888, attempting to modify the ordinance of December 10, 1866.

Objected to on the part of Respondent as being immaterial and incompetent; the grant therein made not having been made to the complainant in this action, and being beyond the power of the City Council to make. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 63, being an ordinance passed by the City of Des Moines, July 27, 1888, entitled, An Ordinance imposing Additional duties and granting certain privileges and exclusive rights to the Des Moines Broad Gauge Street Railway Company.

Objected to on the part of respondent as immaterial and incompetent; the grants attempted to be made in said ordinance
2387 not being grants to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 64, being an acceptance by the Broad Gauge Company of the ordinance Exhibit No. 63.

Objected to on the part of Respondent as being immaterial, incompetent, and not being acceptance by the complainants in this action of any rights granted to it.

Complainant offers in evidence Exhibit No. 65, being Warranty Deed for Lots 27 and 28, Block 15 Stewart's Addition, from the Des Moines Broad Gauge Street Railway Company to the Des Moines Electric Railway Company, dated July 31, 1888, recorded in Book 209, at page 532 of the records of Polk County.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 66, being a conveyance from the Des Moines Broad Gauge Street Railway Company to the Des Moines Electric Railway Company of certain Street railroad properties, dated the —— day of July, 1888, recorded in Book 201, page 204.

Objected to as being immaterial and incompetent; and for the further reason that the Des Moines Broad Gauge Street Railway Company has no power to convey any franchise, rights, or privileges granted to it by the City of Des Moines, or the town of North Des Moines, or the Board of Supervisors of Polk County, in the
2388 manner attempted in this instrument. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 67, the same being a petition in the case of the City of Des Moines against the Des Moines Street Railroad Company, in the District Court of Iowa, in and for Polk County, September Term, 1888, no. 1677 Equity, and Exhibits "A" "B" and "C" to said petition.

Objected to on the part of Respondent as being incompetent and immaterial, it not being a petition filed in a case between the same parties as the case at bar, not involving the same issues. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 68, the same being a motion filed by the defendant in the suit in which Exhibit No. 67 was the petition.

Respondent interposes the same objection as last above made, and no objection is made on the ground that the exhibit is a copy.

And now, at 12 o'clock, Noon, the further taking of testimony is adjourned until 2 o'clock P. M.

And now, at 2 o'clock P. M., the further taking of testimony herein is resumed as follows:

Complainant offers in evidence Exhibit No. 69, the same being an ordinance passed by the town of North Des Moines, August
2389 8, 1888, entitled, An Ordinance Amending an Ordinance, Authorizing the Des Moines Broad Gauge Street Railway Company to construct and Operate Street Railroads in the incorporated town of North Des Moines, and granting Additional Rights to the Des Moines Electric Company, successors to the Des Moines Broad Gauge Street Railway Company.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights to the complainant in this action, it not being a grant of any right by the City of Des Moines; for the further reason that whatever rights may have been granted thereby, the Des Moines Electric Railway Company ceased and determined at the time the town of North Des Moines became merged in the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence that part of Exhibit No. 70 which shows the filing of the acceptance of this ordinance of August 27, 1888, the same being a copy of the record of the town of North Des Moines.

Respondent objects to it on the ground that the same is immaterial, incompetent and not the best evidence.

Complainant offers in evidence Exhibit No. 71, being a record of the City of Des Moines, October 9, 1888, from Book N, page 278, relative to tracks on West Walnut Street.

Objected to on the part of Respondent as being immaterial
2390 and incompetent, the City Council having no power to grant the right to lay or construct street railways on the streets of the City, by resolution; whatever grant is attempted to be made is made to a company other than the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 72, dated October 9, 1888, from Book N, page 280, being a part of the record of the City Council of the City of Des Moines, relative to the situation of the tracks on West Walnut Street.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 73, being proceedings of the City Council of the City of Des Moines, November 8, 1888, from Book N, page 302, granting the Des Moines Electric Railway Company rights along 4th street in West Des Moines.

Objected to on the part of Respondent as immaterial and incompetent, the Council having no power or right to grant or confer the

right — construct street railways on the streets of the City of Des Moines, by resolution; and for the further reason, that the grant is to a company other than the complainant in this action, and therefore the Company acquired no rights. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 74, being a record of the Town Council of the Town of North Des Moines, of November 13, 1888, referring to the arrest of certain people.

2391 Complainant offers in evidence Exhibit No. 75, being an ordinance passed by the town of North Des Moines, November 13, 1888, entitled, An Ordinance Granting Permission to the Des Moines Street Railroad Company to extend their track on 9th street, from Clarkson Street to Franklin Avenue.

Objected to on the part of Respondent as being immaterial, incompetent, it not being an ordinance of the City of Des Moines; for the further reason, that as shown by the proceedings of the town Council of North Des Moines, as shown in exhibit No. 74, said ordinance was never properly passed and never became a valid ordinance with the town of North Des Moines; for the further reason, that whatever rights were acquired under said ordinance, were acquired by a company other than the complainant in this action, and can confer no rights upon this complainant; and for the reason that all rights acquired under said ordinance, if any, terminated at the time of the consolidation of the Town of North Des Moines with the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence record of the City Council of the City of Des Moines, being Exhibit No. 76, dated January 10, 1889, from Book N, page 381, granting the Electric Company rights on Center Street, from 4th to 20th.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power or right to grant the rights attempted to be granted by

2392 the resolution set forth in said exhibit, by resolution. The grant therein contained is made to a company other than complainant in this action, and this complainant cannot acquire any rights thereunder. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 77, being an ordinance passed by the incorporated town of North Des Moines, February 18, 1889, entitled, An Ordinance Granting to the Des Moines Electric Railway Company, the right to extend its tracks and electrical equipments on Clerk Street in the incorporated town of North Des Moines, Iowa.

Objected to on the part of Respondent as being immaterial, and incompetent, not being an ordinance of the City of Des Moines; not being a grant of any rights to complainant in this action; whatever rights were granted under any ordinance terminated at the time of the consolidation of the town of North Des Moines with the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 78, the same being an ordinance enacted by the town of North Des Moines, April 4, 1889, entitled, An Ordinance granting to the Des Moines Electric Railway Company the right to construct and operate a line of its street railway on North Street.

Respondent interposes the same objection as last made. No objection is made on the ground that the exhibit is a copy.

2393 Complainant offers in evidence Exhibit No. 79, the same being a record of a meeting of the Town Council of North Des Moines, April 26, 1889, relative to the employment of counsel.

Objected to on the part of respondent as being immaterial.

Complainant offers in evidence Exhibit No. 80, the same being a resolution of the City Council of the City of Des Moines, May 1, 1889, from Book N., page 523, granting the Electrical Company rights on Cottage Grove Avenue, between Nineteenth and Twenty-first Streets.

Objected to on the part of Respondent as being immaterial and incompetent, it being a mere regulating resolution, not a resolution conferring any rights upon the complainant or any of its grantees.

Complainant offers in evidence Exhibit No. 81, being a record of the City Council of the City of Des Moines of May 6, 1889, Book N, Page 530, with reference to unoccupied rails at Twelfth & Grand Avenue of the Des Moines Electric Company.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 82, record of the City Council of the City of Des Moines of May 27, 1889, Book N, page 563.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power or right to confer the rights attempted to be granted in said proceeding, in the manner therein attempted; for the further

2394 reason that the grants therein attempted to be made are made to a company other than the complainant in this action, and that this complainant cannot acquire any rights thereunder. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 83, being a resolution of the City Council of Des Moines, dated May 27, 1889, Book N, page 569, granting the electric Company rights upon West Eleventh Street, and School and Twelfth.

Respondent interposes the same objection as last above made. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 84, the same being a resolution of the City Council of Des Moines, of May 28, 1889, Book N, page 574, granting the Electric Company rights on Cottage Grove Avenue and Twenty-fourth Streets and Twenty-first Street.

Respondent makes the same objection as to the second preceding exhibit, waiving any objection to the exhibit being a copy.

Complainant offers in evidence Exhibit No. 85, the same being a resolution of the City Council of the City of Des Moines, September 5, 1889, Book O, page- 114-115.

Objected to on the part of Respondent as being immaterial and in-

competent, complainant not being one of the companies affected thereby. No objection is made on the ground that the exhibit is a copy.

2385 Complainant offers in evidence Exhibit No. 86, being a resolution of the City Council of the City of Des Moines, of September 5, 1889, Book O, page- 118-119.

Respondent interposes the same objection last above made, waiving any objection to the exhibit being a copy.

Complainant offers in evidence Exhibit No. 87, the same being the resolution passed by the City Council of the City of Des Moines, September 5, 1889, Book O, pages 119-120.

Objected to on the part of Respondent as being immaterial and incompetent, the rights attempted to be granted thereby being such that the City Council has no power to grant them by resolution; for the reason that the complainant in this action is not one of the Companies affected thereby. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 88, being acceptance, September 10, 1889, Book O, pages 124-125 of the resolution of September 5, 1889, already offered.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence from the printed book, entitled "The Revised Ordinances of 1900 of the City of Des Moines, Iowa, published by Authority of the City of Des Moines," from the middle of page 443 the following:

"Subdivision III. Street Railways — Consolidation Resolutions. Adopted September 5, 1889. (Pages 532 to 534, R. O. 1889)

2386 Section 1339."

It is agreed that Section 1339 is the same as the preamble to the Resolution, Exhibit No. 86.

"SECTION 1340." It is admitted that Section 1340 is identical with the Resolution offered as Exhibit No. 87.

"SECTION 1341." It is admitted that section 1341 is identical with Exhibit No. 88 already offered.

Which offer is objected to on the part of Respondent as being immaterial and incompetent, for the reason that said sections are mere resolutions and do not purport to be ordinances of the City of Des Moines, and that no rights, such as are attempted in said resolution can be granted by the City Council of the City of Des Moines, by resolution; and for the reason that the complainant in this action is not one of the companies affected by these sections.

Complainant also offers from the printed book entitled, "The Revised Ordinances of the City of Des Moines, Published by Authority of the City Council," commencing with the words "Street Railways" in the fourth line from the bottom of page 531, down to and including the words, "Filed September 10, 1889" in the eighth line from the top of page 534 of said revised ordinances.

It is admitted that the parts of the Revised Ordinances of 1889 of the City of Des Moines, above offered, are the same resolutions that were offered from the Revised Ordinances of 1900, which resolutions were passed September 5, 1889, and the acceptance thereof.

2397 The Respondent interposes the same objection last above made.

Complainant offers from the Revised Ordinances of 1889, of the City of Des Moines, published in book form, and entitled, "The Revised Ordinances of the City of Des Moines, of 1889, published by Authority of the City Council," Chapter 140, page 534, as follows:

"Adoption of Revision—An Ordinance Adopting the Revised Ordinances of 1889.

O. 483. P. September 20, 1889.

SEC. 1. Be it Ordained by the City Council of the City of Des Moines: The following ordinances revised by order of the City Council, by I. A. Hammer, William Matthews and Hugh Brennan, numbered from Chapter 1 to Chapter 140, inclusive, and including this ordinance, be and the same are hereby adopted as the Revised Ordinances of the City of Des Moines, Iowa, and shall be known as the Revised Ordinances of 1889, and are and shall be entitled as hereinafter described in this ordinance, namely:

CHAP. 1. An Ordinance describing the Wards and Boundaries of the City. * * *

CHAP. 53. An Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines.

CHAP. 54. An Ordinance Authorizing the Maintenance and Operation of a Street Railroad by the Des Moines Street Railroad Company in, upon and along certain Streets in the City of Des Moines, providing penalties for a violation thereof, and to Repeal an Ordinance, entitled, An Ordinance Authorizing the Construction of certain Street Railroads in and along the Streets of
2398 the City of Des Moines, passed December 10, 1866, and Amendments thereto, passed February 5, 1872, and to Repeal an Ordinance passed September 14, 1886, entitled, An Ordinance to Amend an Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines, Adopted December 10, 1866, and amendments thereto, passed February 5, 1872.

CHAP. 55. An Ordinance Authorizing the Construction and Operation of Street Railroads in South Des Moines, along and across the Streets and Alleys therein.

CHAP. 56. An Ordinance Authorizing the Des Moines Broad Gauge Street Railway Company to construct and operate street railways in the City of Des Moines, and Defining the Powers and Duties of said Company.

CHAP. 57. An Ordinance Authorizing the Des Moines Broad Gauge Street Railway Company to Construct, Maintain and Operate by Electric or other motive Power, other than Animal or Steam Power, on any street, Street Railroads in the City of Des Moines, and Defining the Powers and Duties of said Company.

CHAP. 58. An Ordinance Imposing Additional Duties and grant-

ing Certain Privileges and exclusive right to the Des Moines Broad Gauge Street Railway Company.

CHAP. 59. An Ordinance Granting to the Des Moines Belt Line Railway Company the Right to Construct, Maintain and Operate its Railway along and upon a certain Street and across Certain Streets in the City of Des Moines.

CHAP. 60. An Ordinance Granting to the Des Moines River Line Street Railway Company the right to construct and operate a Street Railway in certain Streets of the City of Des Moines.

CHAP. 61. An Ordinance Granting to the Des Moines Rapid Transit Company the right to construct, maintain and
2399 operate its Railway along and upon certain street- and across certain Streets in the City of Des Moines.

CHAP. 62. An Ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railway along Grand Avenue in the City of Des Moines, Iowa, from a point where its Railway is now projected, will intersect said Avenue between West Seventeenth and Nineteenth Streets, to the intersection of East Fifth Street with said Grand Avenue.

CHAP. 65. An Ordinance to Amend an Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines. Adopted December 10, 1866, and amendments thereto passed February 5, 1872.

CHAP. 66. An Ordinance Amending an Ordinance entitled, an Ordinance granting to the Des Moines Rapid Transit Company the Right to Extend its Railway along Grand Avenue in the City of Des Moines, Iowa, from a point where its railway is now projected, will intersect said Avenue, between Seventeenth and Nineteenth Streets to the intersection of East Fifth Street with said Grand Avenue. Passed August 21, 1888; approved on the same date; published August 23, 1888. * * *

SEC. 3. Actions or Proceedings pending and rights accrued and liabilities incurred prior hereto under the ordinances heretofore in force in behalf or against the City shall not be affected by any changes in the ordinances of the City by these Revised Ordinances of 1889.

SEC. 4. These Revised Ordinances of 1889 contain all the ordinances of a general character in force or effect at or from their passage and publication in the manner provided by law."

2400 This offer is objected to on the part of the Respondent as being immaterial, incompetent, in so far as it is offered for the purpose of showing that the resolutions known as the consolidation resolutions were adopted as ordinances, for the reason that the record of the resolutions themselves as set forth in the revision shows, that they are incorporated merely as resolutions and not as ordinances or parts of ordinances.

From the same book, The Revised Ordinances of the City of Des Moines of 1889, complainant offers Chapter 53.

It is admitted that this is the Turner Ordinance, passed December 10, 1866, with such modifications of the same as had been made prior to the revision in question. Complainant offers in evidence Chapter 54 from the said Revised Ordinances.

It is admitted that the said Chapter 54 is identical with Exhibit No. 62 already offered.

Complainant offers from the said Revision Chapter 55, the same being an Ordinance authorizing the Construction and Operation of Street Railroads in South Des Moines, along and across the streets and alleys therein, passed November 9, 1883.

It is admitted that the said ordinance is identical with Exhibit No. 91, offered by complainant.

Objected to on the part of Respondent as being immaterial and incompetent, the ordinance in question conferring no rights upon the complainant in this action.

Complainant offers in evidence Chapter 56 of the said Revision.

"Broad Gauge Street Railway. An Ordinance Authorizing
2401 the Des Moines Broad Gauge Street Railway Company to Construct and Operate Street Railways in the City of Des Moines, and Defining the powers and duties of said Company. Ordinance 354. Passed June 29, 1886."

It is admitted that this ordinance is identical with Exhibit No. 26.

Respondent interposes the same objection as last above made.

Complainant offers in evidence Chapter 57 of the said revised ordinances, as follows: "Broad Gauge Electric Street Railway. An Ordinance Authorizing the Des Moines Broad Gauge Electric Street Railway Company to Construct, Maintain and Operate by Electric or other Motive Power, other than Animal or Steam Power on any Street, Street Railroads in the City of Des Moines, and Defining the Powers and Duties of said Company. O. 399. P. December 20, 1887."

It is admitted that this ordinance is identical with Exhibit No. 57 already offered in evidence.

Respondent interposes the same objection as next to last preceding above made.

Complainant offers in evidence Chapter 58 of the said ordinances, as follows:

"CHAP. 58. Granting Certain Privileges to the Des Moines Broad Gauge Street Railway. An Ordinance Imposing Additional Duties and granting certain Privileges and Exclusive Rights to the Des Moines Broad Gauge Street Railway Company. O. 438. P. July 27, 1888."

It is admitted that the said ordinance is identical with Exhibit No. 63 already offered in evidence.

2402 Respondent interposes the same objection last before made.

Complainant offers in evidence Chapter 59 of the said Revised Ordinances, as follows: "Des Moines Belt Line Railway Company. An Ordinance granting to the Des Moines Belt Line Railway Company the Right to Construct, Maintain and Operate its Railway along and upon a certain street, and to cross Certain Streets in the City of Des Moines. O. 429. P. May 16, 1888."

2403 Complainant offers in evidence Chapter 60 of the said Revised Ordinances. "Des Moines River Line Street Railway Company. An Ordinance Granting to the Des Moines River Line

Street Railway Company the Right to Construct and Operate a Street Railway in certain Streets of the City of Des Moines. O. 445 P. September 20, 1888.

2401 Complainant offers in evidence from the said Revised Ordinances, Chapter 61 thereof, as follows:

Des Moines Rapid Transit Company.

An Ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along, and upon a certain street and to cross certain streets in the City of Des Moines.

O. 425. P. May 14, 1888.

SECTION 1. Be it ordained by the City Council of the city of Des Moines: That there is hereby granted to the Des Moines Rapid Transit Company the right to build, construct and operate its railway along and upon the thirty-three foot street running east and west between West & Burton's and Cottage Hill Additions to Fort Des Moines, now included in the corporate limits of the City of Des Moines, and said company shall have a right to lay down and maintain a single or double track along and upon said street, with all switches and turn-outs necessary in operating its said road. And said company shall have the further right to cross the following streets of said city, to-wit Nineteenth street, Twenty-first street and Western Avenue.

SEC. 2. Whenever said street shall be paved or improved at the established grade thereon said Des Moines Rapid Transit Company will bring that part of such street covered by its tracks to such grade, and will pave and maintain in width three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets crossed by said railway within the corporate limits of the city.

SEC. 3. That if the said Rapid Transit Company shall procure a street thirty-three and one-third feet wide, to be opened upon each side of and abutting on said street, it shall have the

2405 right to appropriate a strip of said street so running east and west between said West & Burton's and Cottage Hill Additions ten feet wide on each side of the center line thereof for its exclusive right-of-way, and it shall not in such case be compelled to pave the said twenty foot right-of-way only at the street crossings. But said company shall curb its right of way when said street is ordered to be paved.

SEC. 4. The right-of-way herein granted is upon the express terms and conditions that the said Des Moines Rapid Transit Company shall never use said street or any part thereof for general railroad purposes; nor shall said company grant or allow any other railway company to use its track or right of way for general railway purposes.

SEC. 5. That said company shall have the right to propel its cars on its railway by a steam or electric motor, but the speed thereof

shall not exceed eight miles per hour within the corporate limits of said city. Provided that in the construction of said railway an ordinary railroad engine may be used.

SEC. 6. If the said Rapid Transit Company shall at any time procure a street to be opened up on either or both sides of its right-of-way from the west line of West & Burtons addition to Western avenue and the city of Des Moines shall order the same paved then, and in that case, said company shall put in and maintain curbing on each side of its right-of-way on the line of said street or streets.

SEC. 7. This ordinance shall not be construed as granting said Des Moines Rapid Transit Company the right to lay down or maintain its tracks along, upon or across any other street or streets than the ones named herein.

2405 SEC. 8. The fare to be charged by said Des Moines Rapid Transit Company shall not exceed five cents within the corporate limits of said city, for one trip or over one route.

SEC. 9. Said Des Moines Rapid Transit Company shall be liable for any and all damages resulting to persons or property resulting from the construction, maintaining and operating said railway.

SEC. 10. The said Des Moines Rapid Transit Company hereby agrees to complete said road and to have cars running thereon on or before the first day of June A. D., 1889, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited.

Respondent interposes same objection as last before made.

Complainant offers in evidence Chapter 62 of the said Revision as follows:

Des Moines Rapid Transit Railway Company.

An Ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railway along Grand Avenue in the City of Des Moines, Iowa, from the point where its railway as now projected will intersect said avenue, between West Seventeenth and Nineteenth streets, to the intersection of East Fifth Street with said Grand Avenue.

O. 440. P. August 21, 1888. Amendments to O. 426.

SECTION 1. Be it ordained by the city council of the City of Des Moines: That there be and is hereby granted to the Des Moines Rapid Transit Company, the right to build or acquire by
2407 lease or otherwise and maintain and operate a single or double track street railway, with all necessary switches and turnouts, along and over Grand Avenue in the city of Des Moines from the point on said avenue between West Seventeenth and Nineteenth streets where said Company's road as now projected will intersect said street to the point of intersection of East Fifth street with said avenue, and it is hereby authorized to propel its cars thereon by steam applied by what is known as the cable system or by what are known as noiseless steam or electric motors, or other power, except

horse power, and the power herein granted to operate its said road with electricity, or other power except steam or animal power, shall be exclusive for the period of ten years from the acceptance of this ordinance; provided, however, that this grant shall in no way abridge or interfere with vested rights of any other street railway company now occupying said street, if any there be.

SEC. 2. In the construction and operation of said company's railway along said street said company shall exercise all reasonable care so as not unnecessarily to interfere with or impede the public travel on said street. All new tracks laid by said company shall be laid so as to conform to the established grade of the City, if the surface of the street has been brought to grade, and if not, then the track may be laid so as to conform to the surface of the street and shall be brought by the company to grade when the city brings its streets or any part thereof to grade free from expense to the city.

SEC. 3. The tracks of said company shall be laid in the center of said street except where a double track is contemplated, or when some other company is or shall be hereafter authorized to lay a track on the same street, and in either of said last named cases
2408 the tracks shall be laid at such distances from the center of said street as that the center of said street shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the City Engineer, and provided, further, that if any other street railway company shall hereafter be granted the right to lay its tracks upon any part of said street upon which the said Rapid Transit Railway Company, or its assigns, shall have a track or tracks of its rail road then laid or acquired, it shall, on demand of said other company, remove its track or tracks to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built. Provided, however, that before it shall be required to make such removal the company desiring the same shall pay or tender the cost of making such change and if upon such demand and tender of the cost of such removal the same shall not be made within thirty days then such track shall be removed and relaid by the City Marshal, under the supervision of the City Engineer, at the cost of the company desiring such change. Provided, however, that there shall not be more than two tracks of any railway laid on any part of said street, except for the necessary switches and turn-outs, nor shall said tracks be laid within twelve feet of the sidewalk on said street, except at points where turn-outs are necessary for the convenient operation of the road for reaching its stations, car houses and shops.

SEC. 4. The cars to be used upon such tracks by said company shall be of the best style and class used in other first class cities and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used
2409 thereon for propelling the cars of said company shall be of the most approved make and pattern and shall be what are termed *noiseless* motor.

SEC. 5. This grant shall be subject to all the rights of the water

and gas companies and street railway companies, under grants heretofore made to them by the city of Des Moines, and said city shall in no way be held liable to said company or its assigns, for any outlay or damage caused to said Rapid Transit Railway Company by the construction or repairing of sewers, repairing or building of bridges, grading and repairing the streets on which such railroad track is laid; provided, the same is done in a careful and expeditious manner, or damages resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 6. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the City limits on any one route provided, children under six years shall go free if accompanied by their parents.

SEC. 7. The cars of said company shall be entitled to the track, in all cases when a team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the car bell or otherwise, and should the person or persons in charge of such team or vehicle wilfully violate the provisions of this section they shall, upon conviction thereof before the Police Judge of this city, be fined not less than five or more than fifty dollars.

SEC. 8. In the construction of its railway upon or over all bridges or viaducts, upon the street or streets along which the same
2410 may run, said company shall so construct the same that the top surface of the rails of said railway shall be on the level with the surface of the floor of the bridge, and on all paved streets the top surface of the rails shall be on the level with the surface of the paving and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run, said parties, or their assigns, shall at their own expense pave or otherwise improve the space between the rails of their tracks, that it shall substantially correspond with the improvement of the street outside of the rails and tracks. When the tracks are laid upon a street already paved, the said parties, or their assigns, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to cover said estimate for the paving within the rails, and said parties or their assigns, shall plank the space between the track at each principal crossing whenever required by the City Council and to its satisfaction, and they shall restore all streets whether paved or not to as good condition as before the laying down of their tracks.

SEC. 9. A failure from any fault of said company to use any track or tracks so constructed and run cars thereon on any street or part of street for a period of thirty days shall be deemed the abandonment of such street or part of street by said company or its assigns, and the City Council may by resolution declare such street or part of street abandoned and require the said company, or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove its

track or tracks when notified to do so, the City Council may
2411 cause the same to be removed at the expense of said company or its assigns.

SEC. 10. In construction, repairing and operating said street railway said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property and shall at all times respond to the City of Des Moines, for, and save it harmless from, all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers or employés in the construction, reconstruction, repairing or operating of said street railway or in paving, repaving or repairing of any street or by reason of any and every act done under the provisions of this ordinance.

SEC. 11. The said company, or its assigns, shall commence work on their line within five months from the acceptance of the terms and conditions of this ordinance, and shall have its track completed and cars running thereon within eighteen months from the date of said acceptance.

SEC. 12. The city of Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches, turn-outs and turntables of said road to be constructed under this ordinance, on said part of said streets, for the distance of two blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested; and, in case of disagreement, then the same to be settled by arbitrators—one chosen by each of said companies, and the two chosen to select a third, and the persons thus chosen shall decide upon the terms and what would be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

SEC. 13. The slot rails used by said company in the construction and maintenance of said road, if it shall be constructed as a
2412 cable railroad, shall be constructed and placed so that the slot between said rails for the accommodation of the grip arm shall not exceed in width three-fourths of an inch, and shall be so constructed as to present a flat and even surface and the upper surface of said slot rails adjoining said slot shall not be made beveling, but shall be made flat and square, so as to prevent the wheels of carriages and other vehicles and the calks of shoes on horses or other animals from dropping into and catching on said slot while passing along or over the same.

SEC. 14. The cars or carriages operated by said company, or its assigns, shall be run along and upon said railway in conformity with the following rules and regulations:

First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portion of the city nor more than ten miles an hour elsewhere.

Second. While the cars are turning corners from one street to another they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in

cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing on any street at any time, unless the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop upon or over a cross-walk at intersecting streets, except to prevent a collision or to avoid danger to persons in the street, or to take on or leave off passengers.

2413 Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such crossings and they shall observe the same rule when nearing the track of any railway other than a street railway.

Seventh. Cars after sunset shall be provided with signal lights.

Eighth. Cars shall start from both ends of said line as early as six o'clock A. M., and run continuously as late as twelve o'clock midnight, from six to nine o'clock A. M., and from nine o'clock P. M. to midnight, cars shall run at intervals of not more than five minutes.

SECTION 15. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that any judgment that may hereafter be obtained against said company, or assigns, for any injury to any person or property on account of the construction or operation of said railway, shall be a lien upon all the property of said Company and such lien shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

SEC. 16. The City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 17. Within sixty days from the passage of this ordinance said company shall file with the City Clerk a written acceptance of the grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company."

Respondent interposes same objection as last above.

2414 Complainant offers in evidence Chapter 65 of the said revised ordinances, as follows:

Amending Narrow Gauge Street Railway etc. An Ordinance to Amend an Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines, adopted December 10, 1866, and amendments thereto passed February 5, 1872. O. 362 P. September 16, 1886.

It is admitted that the said Chapter 65 is identical with Exhibit No. 39 already offered in evidence.

2415 Complainant offers in evidence Chapter 66 of the said Revised Ordinances, as follows:

"An Ordinance Amending an Ordinance, entitled "An Ordinance granting to the Des Moines Rapid Transit Company the Right to Extend its Railway along Grand Avenue, in the City of Des Moines, Iowa, from the point where its railway is now projected will intersect said Avenue, between Seventeenth and Nineteenth streets, to the Intersection of East Fifth street with said Grand Avenue," passed August 21, 1888, approved on same date and published August 23, 1888.

O. 464. P. March 12, 1889.

SECTION 1. Be it Ordained by the City Council of the City of Des Moines: That section one of the above entitled ordinance, passed August 21, 1888, be and the same is hereby repealed, and there is enacted in lieu thereof the following:

SEC. 1. That there be and is hereby granted to the Des Moines Rapid Transit Company the right to build or acquire by lease or otherwise, and maintain and operate a single or double track street railway, with all necessary switches and turnouts, along and over Grand Avenue, in the City of Des Moines, from a point on said Avenue between West Seventeenth street and Nineteenth street, where said company's road as now constructed intersects the said street, to a point of intersection of East Fifth street with said Avenue and along and over the following streets and parts of streets, to-wit: West Fifteenth Street from Grand Avenue to Walnut street, thence east on Walnut street to West Eighth street thence south on West Eighth street to Mulberry street, thence east on Mulberry street to West Fifth Street, thence south on West Fifth street to Court Avenue, thence east on Court Avenue to East Sixth street, thence north on East Sixth street to Walnut street, thence east on Walnut street to the corporation line; East Sixteenth Street from
2416 Capital Avenue south to Brooks street, thence east on Brooks street to the corporation line; East Fourteenth street from Walnut street to the north corporation line; East Seventh street from Des Moines River to Locust street, thence crossing Locust street to Pennsylvania Avenue, thence on Pennsylvania Avenue to Lyon street, thence east on Lyon street to East Eighteenth street, thence north on East Eighteenth street to the corporate line; West Twenty-fourth street, from the line of said company's railway to the north corporation line; West Seventh street from north corporation line to the south corporation line. And the said company is hereby authorized to propel its cars thereon by steam applied by what is known as the cable system, or by the Patton motor system, or by electricity, or by such other power as may hereafter be approved by ordinance of the City Council. Provided, however, that if electricity is used, it shall be applied by a storage battery, or through underground conduits, and the power herein granted to operate its said road with electricity or other power shall be exclusive only as to Grand Avenue for the period of ten years from the acceptance of this ordinance.

Provided, however, that this grant shall in no way abridge or interfere with the vested rights of any other street railway company

now occupying any of said streets or parts of streets, if any there be, and this company is authorized to run its cars along and over the track or tracks of any other street railway in the City of Des Moines, and to haul cars of any such company on and over its tracks; provided, such other company shall consent thereto, and said Rapid transit Company shall not be required to run its cars over its line oftener than once every thirty minutes; provided, it shall run the same on schedule time.

SEC. 2. That section two of the ordinance of which this is amendatory is hereby repealed, and there is enacted in lieu thereof the following section:

SEC. 2. That this company or its assigns shall commence work on its road within six months from the passage of this ordinance and construct or procure by lease or otherwise two miles of track within one year from such date, and shall construct or procure one mile of track each year thereafter, until it shall have occupied the several streets along which the right of way is herein granted to it, and a failure so to do shall forfeit the rights herein granted, over and along the streets or parts of streets not thus occupied.

Same objection as last above.

2417 Complainant offers in evidence Exhibit No. 89, the same being a Bill of Sale from the Des Moines Electric Railway Company to the Des Moines Street Railroad Company, dated October 1, 1889, and recorded in Book 233, page 65, Polk County records.

Objected to on the part of Respondents as being immaterial, incompetent, in so far as it attempts to convey any franchise rights or privileges granted by the City of Des Moines or the other municipal corporations named therein, for the reason that such franchise rights and privileges cannot be conveyed in such a manner. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 90, the same being a Deed from the Des Moines Electric Company to the Des Moines Street Railroad Company, dated October 1, 1889, and recorded in Book 226 at page 214 of the Polk County Records, conveying certain lots.

Complainant offers in evidence Exhibit No. 91, the same being entitled, An Ordinance Authorizing the Construction and Operation of Street Railroads in South Des Moines, along and across the Streets and Alleys therein.

Objected to on the part of Respondents as being immaterial and incompetent, the rights therein granted being granted to another company than the complainant in this action. No objection is made on the ground that the exhibit is a copy.

2418 Complaint offers in evidence Exhibit No. 92, the same being the acceptance of exhibit No. 91.

At this time 4 o'clock P. M., an adjournment was taken until 9 o'clock A. M., March 8th, 1906.

Now at 9 o'clock A. M., March 8, 1906, by agreement of the parties, an adjournment is taken until 9 o'clock A. M., March 9, 1906.

MARCH 9, 1906—2 o'clock A. M.

Pursuant to the adjournment, the taking of the testimony on the part of Complainant was resumed as follows:

Complainant offers in evidence Exhibit No. 93, the same being an ordinance entitled, An Ordinance Authorizing the Construction and Operation of Street Railways in Sevastopol, Polk County, Iowa, along and across the Streets and Alleys thereof. Passed by the Town of Sevastopol, August 10, 1885.

Objected to on the part of Respondent as being immaterial and incompetent, it not being a grant of any rights of the Complainant in this action, nor any grant by the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 94, being an ordinance to amend Section 9 of Ordinance No. 294 of the City of Des Moines, passed August 24, 1885.

Objected to on the part of Respondent as being immaterial and incompetent, the ordinance showing upon its face that it is an invalid ordinance, not in conformity with law; that whatever rights are attempted to be granted thereunder, were not granted to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

2419 Complainant offers in evidence Exhibit No. 95, the same being a Bill of Sale, executed by the Des Moines & Sevastopol Street Railway Company to the Des Moines Street Railroad Company, of date October 1, 1889, recorded in Book 233, page 68, Polk County Records.

Objected to on the part of Respondents as being immaterial and incompetent; for the further reason that in so far as the Bill of Sale attempts to convey the franchise rights and privileges granted by the City of Des Moines to the incorporated Town of Sevastopol, the offer is incompetent, for the reason that such rights cannot be transferred in that manner. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 96, the same being a protest of certain citizens against removing the track or tracks from Locust Street, from Record Book O, pages 211-212, dated December 4, 1889.

Objected to on the part of Respondent as being incompetent and immaterial. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 97, the same being an ordinance of the Town of North Des Moines, passed January 20, 1890, granting to the Des Moines Street Railroad Company the right to operate lines by electricity.

2420 Objected to on the part of Respondent as being immaterial and incompetent, it not being a grant of any rights to the complainant in this action, nor a grant of any rights to any company by the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 98, being record Book O, page 245 of the Council Proceedings of the City of Des Moines,

showing the presentation of a petition and resolution, dated January 29, 1890, relative to ordering the construction of a Street Car line on east 5th, Walnut, Scott and other streets.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council having no power or right to grant the privileges attempted to be granted in said resolution by resolution. For the further reason, that the grant is not to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 99, the same being a record of the Council Proceedings of the City of Des Moines, from Book O, page 256, dated February 6, 1890, relative to the extension of the Sevastopol line.

Respondent interposes the same objection as last above made, with the same qualification as to the exhibit being a copy.

Complainant offers in evidence Exhibit No. 100, the same being Council Proceedings of February 28, 1890, from Book O, page 274, relative to rebuilding track on East 9th Street.

Respondent interposes the same objection as last above, with same qualification.

2421 Complainant offers in evidence Exhibit No. 101, the same being Council proceedings of the City of Des Moines, March 8, 1890, from Record Book O, page 280, showing introduction and passage of an ordinance to amend an ordinance, No. 63, being chapter 53 of the Revised Ordinances of 1889.

Complainant offers in evidence Exhibit No. 102, the same being an ordinance passed by the City Council of the City of Des Moines, March 8, 1890 amending an Ordinance authorizing the construction and operation of certain street railroads, passed December 10, 1866, it being the ordinance referred to in the preceding exhibit.

Objected to on the part of Respondent as being immaterial, and incompetent, the preceding exhibit showing that the said ordinance was never properly passed, and therefore not a valid ordinance, and for the reason that the grants therein made are not to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 103, being resolution passed by the City Council of the City of Des Moines, April 18, 1890, showing resolution as to car lines on West Tenth and School Street, from Book O., page 346.

Objected to on the part of Respondent as being immaterial, and incompetent, the City Council of the City of Des Moines having no power or right to grant the privileges attempted to be granted in said resolution by resolution. No objection is made on the ground that the exhibit is a copy.

2422 Complainant offers in evidence Exhibit No. 104, the same being Chapter 11 of the Acts of the Twenty-third General Assembly, approved April 24, 1890.

Complainant offers in evidence Exhibit No. 105, the same being a resolution by the City Council of the City of Des Moines, Passed June 7, 1890, relative to a track on West Fifth Street and other tracks, from Book O, page 419.

Objected to on the part of Respondent as being immaterial, and incompetent, the City Council having no power to grant the privileges therein attempted to be granted by resolution; for the further reason, that the grant is not to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 106, the same being a record of the City Council of Des Moines, of April 20, 1891, from Book P, pages 115-116, showing resolution relative to unused street railway tracks.

Complainant offers in evidence Exhibit No. 107, the same being record of the Proceedings of the City Council of the City of Des Moines, July 27, 1891, from Book P, page 271, relative to Walnut street bridge.

Objected to on the part of Respondent as being immaterial, and incompetent, the City of Des Moines having no power or right to grant the privileges attempted to be granted in said resolution by resolution. No objection is made on the ground that the exhibit is a copy.

2423 Complainant offers in evidence Exhibit No. 108, the same being a record of the proceedings of the City Council of Des Moines, August 3, 1891, from Book P, page 280, relative to Walnut street Bridge, and also showing acceptance of the provisions there referred to by the Des Moines Street Railroad Company.

Objected to on the part of Respondent as being immaterial, and incompetent, the Council having no power or right to grant the privileges attempted to be granted in said resolution by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 109, the same being a record of the proceedings of the City Council, April 15, 1892, from Book P, pages 541-2, showing resolution relative to connecting with steam roads and hauling freight.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council having no power or right to grant the privileges attempted to be granted in said resolution in any manner or form whatsoever; and further, if it has the right to confer such privileges, they cannot be granted by resolution.

Complainant offers in evidence Exhibit No. 110, the same being record of proceedings of the City Council, May 1, 1893, Book Q, page 324, showing resolution with respect to kind of rail to be used.

Objected to on the part of Respondent as being immaterial.

2424 Complainant offers in evidence Exhibit No. 111, the same being a record of the proceedings of the City Council of Des Moines, July 17, 1893, from Book Q, page 461, relative to a track on Mulberry Street.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power or right to grant the privileges attempted to be granted in said resolution by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 112, the same being proceedings of the City Council of the City of Des Moines, July 24,

1893, from Book Q, page 491, relative to re-arrangement of tracks on Walnut Street.

Respondent interposes the same objection as last before, with the same qualification as to the exhibit being a copy.

Complainant offers in evidence Exhibit No. 113, an ordinance entitled, An Ordinance granting to the Des Moines Rapid Transit Company the right to Construct, Maintain and Operate its Railways along a certain street and to cross certain streets in the City of Des Moines. O. 426. P. May 14, 1888.

Objected to on the part of Respondent as being immaterial and incompetent, the ordinance in question not being a grant of any right to the Complainant in this action. No objection is made on the ground that the exhibit is a copy.

2425 Complainant offers in evidence Exhibit No. 114, the same being an ordinance granting to the Des Moines Rapid Transit Railway Company a right to extend its railways along Grand Avenue in the City of Des Moines, Iowa, from the point where its railway is now projected to intersect said Avenue between West Seventeenth and Nineteenth Streets, to the intersection at East 5th street of said Grand Avenue, being No. 440, passed August 21, 1888, the same being an ordinance of the City of Des Moines.

Objected to on the part of Respondent for the same reasons as last before. No objections are made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 115, the same being an ordinance of the Town of Greenwood Park, entitled, An Ordinance granting to the Des Moines Rapid Transit Company the right to Construct, Maintain and Operate its Railway along and upon a certain street and across certain streets in the incorporated town of Greenwood Park, passed September 28, 1888.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights by the City of Des Moines, or a grant of any rights to the complainant in this action. For the further reason, the exhibit shows upon its face that the ordinance was never properly passed, and therefore is not a valid ordinance. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 116, the same being a record of the proceedings of the City Council of Des Moines, March 21, 1892, from Book P, page 528, showing the adoption of a resolution ordering the ordinance of the town of Greenwood Park

2426 Exhibit No. 115, recorded.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power or right to direct the recording of the ordinance of any other town or city; and the further objection is now made to the preceding exhibit, that the ordinance is not a valid ordinance, because not properly recorded as required by law, as shown by Exhibit 116. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 117, the same being an ordinance of the City of Des Moines, entitled, An Ordinance

Amending an Ordinance, entitled an Ordinance Granting to the Des Moines Rapid Transit Company a right to extend its Railway along Grand Avenue in the City of Des Moines, from the point where its Railway is now projected to intersect said Avenue between Seventeenth and Nineteenth Streets to the Intersection of East Fifth Street with said Grand Avenue, passed August 21, 1888, approved on the same day. Published August 23, 1888. O. 464 P. March 12, 1889.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 118, the same being a record of the proceedings of the City Council of the City of Des Moines, March 18, 1889, from Book X, page 463, being an
2427 acceptance of Ordinance, Exhibit No. 117, by the Rapid Transit Company.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 119, the same being a Deed from the Des Moines Rapid Transit Company to the Des Moines Suburban Railway Company, dated January 7, 1890, conveying to the said Suburban Railway Company, franchise, right-of-way, etc., recorded in Book 237, page 367 Polk County Records.

Objected to on the part of Respondent as being immaterial, incompetent, for the reason that in so far as the deed attempts to transfer any franchise or right, or privileges of the Des Moines Rapid Transit Company, it is incompetent, because such rights and privileges cannot be granted in that manner. No objection is made on the ground that the exhibit is a copy.

Complainant introduces in evidence Exhibit No. 120, the same being a record of the proceedings of the City Council, of Des Moines, March 11, 1890, from Book O, page 286, showing resolution extending time to the Rapid Transit Company.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power or right to amend, change or alter or modify the terms, provisions or conditions of any ordinance by resolution.

2428 Complainant offers in evidence Exhibit No. 121, the same being resolution of the City Council of the City of Des Moines, extending the time of the Des Moines Rapid Transit Company, to build or acquire its road, Passed March 12, 1890, and also showing acceptance of the same by the Des Moines Rapid Transit Company.

Objected to on the part of Respondent for the same reason as last above. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 122, the same being a record of acceptance of the provisions of the resolution, Exhibit No. 121, by the Des Moines Rapid Transit Company, from Book O, page 288, the same being dated March 13, 1890.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 123, the same being a sheriff's deed to D. B. Murrow, conveying portions of franchise and property of Des Moines Rapid Transit Company, dated May 31, 1890, recorded in Book 237, page 529, Polk County Records.

Objected to on the part of Respondent as being immaterial.

Complainant introduces in evidence Exhibit No. 124, the same being a Deed from the Rapid Transit Company to the Des Moines Suburban Railway Company, dated the 29th day of October, 1890, conveying its property and franchise, recorded in Book 247, page 251, Polk County Records.

Objected to on the part of Respondent as being immaterial
2429 and incompetent, it not being a grant to the complainant in this action. The franchise, rights, and privileges therein attempted to be transferred not being transferrable in the manner therein attempted. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 125, the same being a deed from D. B. Murrow, to the Des Moines Suburban Railway Company, dated December 8, 1890, conveying franchise and property, recorded in Book 254, page 152 of Polk County Records.

Respondent interposes the same objection as last before made. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 126, being Ordinance 425, of the City of Des Moines, passed May 16, 1888, entitled, An Ordinance granting to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its Railway along and on certain streets, and across certain streets in the City of Des Moines.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights to the complainant in this action. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 127, being a resolution of the Town Council of the Town of North Des Moines, as to certain streets.

Objected to on the part of Respondent as being immaterial
2430 and incompetent, the Council of the Town of North Des Moines having no power to vacate the streets by resolution; and it is not the best evidence.

Complainant offers in evidence Exhibit No. 128, the same being a record of proceedings of the City Council of the City of Des Moines, July 7, 1888, from Book N, page 168 showing resolution relative to Belt Line Grade.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 129, the same being proceedings of the City Council of the City of Des Moines, of July 7, 1888, from Book N, page 169, showing resolution relative to Belt Line Road.

Objected to on the part of Respondent as being immaterial and incompetent, the Council having no power or right to grant the privileges therein attempted to be granted in the manner therein at-

tempted. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 130, the same being an Ordinance of the City of Des Moines, No. 441, passed August 22, 1888, entitled, An Ordinance Amending Ordinance No. 425, granting certain privileges to the Des Moines Belt Line Railway Company.

Objected to on the part of Respondent as being immaterial, it being no grant of any rights to the complainant in this action.

2431 Complainant offers in evidence, Exhibit No. 131, the same being record of proceedings of the City Council of the Town of North Des Moines, February 20, 1889, and February 28, 1889, relative to Belt Line Ordinance.

Complainant offers in evidence Exhibit No. 132, the same being an ordinance of North Des Moines, granting certain rights and privileges in the occupation of certain streets of the incorporated Town of North Des Moines, to the Des Moines Belt Line Railway Company, passed February 28, 1889.

Objected to on the part of Respondent as being immaterial and incompetent, the ordinance never having been properly passed, as shown by the preceding exhibit, therefore not a valid ordinance of the Town of North Des Moines. The rights attempted to be granted by such supposed ordinance were not granted to the complainant in this action, or granted by the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 133, the same being an ordinance of the Town of North Des Moines, granting certain rights and privileges for the occupation of streets and alleys by the Town of North Des Moines, to the Belt Line Railway Company, passed February 7, 1890.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights or privileges to the complainant in this action, nor an ordinance of the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

2432 Complainant offers in evidence Exhibit No. 134, being a conveyance from the Des Moines Belt Line Railway Company to the Des Moines Suburban Railway Company, dated October 29, 1890, recorded in Book 247, page 254 of Polk County Records.

Objected to on the part of Respondent as being immaterial and incompetent, the grants made in said deed not being to the complainant in this action and the franchise rights and privileges therein attempted to be granted not being transferrable in that manner. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 135, being Ordinance No. 445 of the City of Des Moines, passed February 20, 1888, granting to the Des Moines River Line Street Railway Company the right to construct and operate a Street Railway on certain streets in the City of Des Moines.

Objected to on the part of Respondent as being immaterial, not being a grant of any rights to the complainant in this action.

Complainant offers in evidence Exhibit No. 136, from Record Book N, page 269, October 1, 1888, showing acceptance by the Des

Moines River Line Street Railway Company of the Ordinance, Exhibit No. 135.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 137, being a resolution, consenting to the use of T rails, adopted by the City Council of the City of Des Moines, October 1, 1888, from Book N, page 270.

2433 Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 138, being a Deed from the Des Moines River Line Street Railway Company to the Des Moines Suburban Railway Company, dated October 29, 1890, Recorded in Book 247, page 253 Polk County Records.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any rights of any property to the complainants in this action; for the further reason, that the franchise, rights and privileges attempted to be granted in said deed are not transferrable in that manner. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 139, being a deed from the Des Moines Suburban Railway Company to the Des Moines City Railway Company, dated July 25, 1893, recorded in Book 294, page 29, Polk County records, conveying its property and right and privileges, including the Rapid Transit and the Belt Line and the River Line properties.

Complainant offers in evidence Exhibit No. 140, the same being a deed from the Des Moines Suburban Railway Company to the Des Moines City Railway Company, dated July 25, 1893, recorded in Book 294, page 36, Polk County Records, conveying certain real estate.

2434 Complainant offers in evidence Exhibit No. 141, the same being a deed from the Des Moines Street Railroad Company to the Des Moines City Railway Company, dated July 25, 1893, recorded in Book 294, page 30, Polk County Records, conveying its rights, privileges and franchises and property, including those acquired from the Broad Gauge and Sevastopol.

Objected to on the part of Respondent as being immaterial and incompetent, the franchise, rights and privileges therein attempted to be granted not being transferrable in the manner therein attempted. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 142, the same being a deed from the Des Moines Street Railroad Company to the Des Moines City Railway Company, dated July 25, 1893, recorded in Book 294, page 39, Polk County records, conveying certain real estate.

Complainant offers in evidence Exhibit No. 143, the same being an ordinance of the Town of Grant Park, Polk County, Iowa, granting to B. F. Elbert and others the right to purchase, lease, or construct and maintain and operate street railways along and upon and across the streets and alleys in the Town of Grant Park.

Objected to on the part of Respondent as being immaterial and

incompetent, not being a grant of any rights to the Complainant in this action, the franchise therein granted having heretofore expired and not being a grant by the City of Des Moines.

2435 Complainant offers in evidence Exhibit No. 144, the same being a deed from B. F. Elbert and the other grantees, in the ordinance, Exhibit No. 143 of the rights thereby acquired, to the Des Moines Suburban Railway Company, which deed is dated January 15, 1889, and recorded in Book 215, page 455, Polk County Records.

Objected to on the part of Respondent as being immaterial and incompetent, the rights and privileges therein attempted to be granted not being transferrable in the manner attempted. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 145, the same being an ordinance of the Town of Capital Park, passed April 19, 1887, granting to the Des Moines Broad Gauge Street Railroad Company the right to construct and operate a street railway in and along the streets of the incorporated town of Capital Park.

Objected to on the part of Respondent as being immaterial and incompetent, the rights and privileges therein attempted to be granted, not being a grant of any franchise, rights or privileges to the complainant in this action, and it not being a grant by the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 146, the same being an ordinance of the incorporated Town of Capital Park, passed June 16, 1887, granting to the Des Moines Street Railroad Company the right to construct and operate a street railroad in and along the streets of said town.

2436 Respondent interposes the same objection as last above interposed. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 147, the same being an ordinance of the incorporated town of Capital Park, passed December 7, 1889, granting to the Des Moines Street Railroad Company the right to use electric or other motive power.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant of any right to the Complainant in this action, or a grant by the City of Des Moines; for the further reason that the ordinance shows upon its face that it is not a valid ordinance of the Town of Capital Park, for the reason that the title does not express the subject of the ordinance. No objection is made on the ground that the exhibit is a copy.

Complainant offers as a part of said Exhibit No. 147, the acceptance of the said ordinance by the Des Moines Street Railway Company, dated December 12, 1889.

Respondent interposes the same objection as last above. No objection is made on the ground that the exhibit is a copy.

At this time, 12 o'clock noon, an adjournment is taken until 2 o'clock P. M., March 9, 1906.

Now, at 2 o'clock P. M., pursuant to the above adjournment, the testimony on the part of Complainants is resumed as follows:

2437 Complainant offers in evidence Exhibit No. 148, being an ordinance of the incorporated town of University Place, passed April 1, 1889, granting to the Des Moines Electric Railway Company authority to construct, maintain and operate a line of railway by electric or other motive power.

Objected to on the part of Respondent as being immaterial and incompetent, the grant contained in the ordinance not being a grant to the Complainant in this action, nor a grant by the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 149, being a resolution of the City Council of the Incorporated Town of University Place, granting certain rights to the Des Moines Street Railroad Company, passed February 11, 1890, and also acceptance of the provisions thereof by the Des Moines Street Railroad Company, dated February 12, 1890.

Objected to on the part of Respondent as being incompetent and immaterial, not being a grant to the Complainant in this action, nor a grant by the City of Des Moines; for the further reason that the City Council has no power to grant the right and privileges attempted to be granted in such resolution by resolution; for the further reason that such resolution attempts to amend or modify certain provisions of the ordinance, Exhibit No. 148, and such ordinance cannot be amended by any resolution.

2438 Complainant offers in evidence the opinion of the Supreme Court of Iowa, rendered May 12, 1894, in the suit of the Des Moines City Railway Company, appellant, *vs.* the City of Des Moines and other- reported in the 90th Volume on Page 770 of the Supreme Court Reports, as follows:

2439 "Action in equity to restrain the defendants from removing or otherwise interfering with part of the railway track of the plaintiff. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiff appeals. Reversed.

Guernsey & Baily for appellant.

Hugh Brennan and J. E. Mershon for appellees.

"ROBINSON, *J.*:

"The plaintiff is a corporation organized and existing under the laws of this state, and owns, and is engaged in the business of operating, a system of street railways in the city of Des Moines. The system includes what is known as the 'Eleventh and Twelfth Street Line,' the 'Clark Street Line,' and the 'Jefferson Street Line.' The Clark street line is a prolongation of the Eleventh and Twelfth street line, and is a little more than two miles in length. The Jefferson street line is somewhat shorter. The portions of Des Moines reached by these lines contain a large number of people, many of whom depend upon the street railway for transportation to the business part of the city, and have no other convenient means of reaching it. The Eleventh and Twelfth street line extends on Twelfth street from Second

street to University avenue,—a distance of two thousand five hundred and fifty-two feet,—and is the part of the railway in controversy. It consists of a single track of two rails, placed in the center of the street, and has been in use for several years. In May, 1893, the city of Des Moines entered into a contract with Bryan & Youngerman for the construction of what is known as 'Sewer number 2,' which included a pipe sewer in Twelfth street where the railway in controversy is located. The city claims the right to construct the sewer in the center of the street, and to compel the temporary removal of the rack for that purpose. The defendants Finkbine &
2440 Chase, as the board of public works of the city, have notified the plaintiff to remove its track to permit the construction of the sewer, and the plaintiff seeks to prevent all interference with the track. The district court dismissed the petition, and adjudged that plaintiff pay the costs of the action.

"The plaintiff is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions arising under that ordinance were considered by this court in *Des Moines St. Ry. Co. vs. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 515, 33 N. W. Rep. 610, and 35 N. W. Rep. 602; *Id.*, 74 Iowa, 586, 38 N. W. Rep. 496. It was held in those cases, in effect, that the ordinance and its acceptance constitute a valid contract between the city and the street railway company. In securing the contract for building the sewers, the contractors believed it would be placed in the center of the street, and perhaps were authorized to act upon that belief, for the reason that most of the sewers of the city had been placed in the center of the streets through which they were constructed, and possibly for other reasons. The contract, however, did not specify in terms in what part of the street the sewer should be placed, excepting that it should be laid 'according to the lines and grades furnished from time to time by the city engineer.' The construction of sewer number 2 was commenced by the contractor and progressed to Eleventh street. The plaintiff had a line of railway in the center of that street, and, when it was reached by the contractor, the plaintiff was asked to remove the track to permit the building of the sewer in the center. It agreed to do so on condition that the sewer on Twelfth street should be placed on one side of its track in that street.
2441 The proposition appears to have been assented to by the contractor and by Mr. Finkbine, of the board of public works. Thereupon the plaintiff caused to be prepared and submitted to the city council a resolution, of which the following is a copy: 'Resolved, that hereafter, where pipe sewers are being put down in the several streets of the city of Des Moines where there is a single track for street railway purposes, such track being in the center of the street, the sewer shall be laid outside of the line of street railway and on one side of the street; the side of the street to be determined by the board of public works.' The resolution was adopted on the seventeenth day of July, and the plaintiff complied with its part

of the agreement by removing its track in eleventh street. The resolution was considered on the twenty-second day of September after this action was commenced.

"It is said by the appellee that every franchise is accepted subject to the police power of the state, which can not be bartered away, and the appellant assents to that proposition. But it is claimed that the demand made by the city is unreasonable, and, therefore, should not be enforced. It is well settled that a municipal ordinance or by-law, to be valid, 'must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state,' and that the courts may declare void, ordinances and by-laws which are not reasonable. *Meyers v. Railway Co.*, 57 Iowa, 557, 10 N. W. Rep. 896, and authorities therein cited: Town of *State Center v. Barenstein*, 65 Iowa, 249, 23 N. W. Rep. 652. See also *City of St. Louis v. Weber*, 44 Mo. 547; 1 Beach, Pub. Corp., section 542; 1 Dill. Mun. Corp., sections 319-322; *Ex parte Chin Yan*, 60 Cal. 82. An ordinance is unreasonable if it be partial, unfair or oppressive in its effects, as by imposing a serious burden without adequate
2442 cause. *Id. Ex parte Frank*, 52 Cal. 606; *Harrisburg City Pass Ry. Co. v. City of Harrisburg*, 24 Atl. Rep. (Pa. Sup.) 56. It is not shown that the sewer in question was located in the center of Twelfth street by ordinance; but, conceding that it was so located by action as formal, and entitled to as much weight, as an ordinance, we are required to determine whether that action was reasonable and valid. The ordinance of the year 1865 required that all single tracks be laid in the center of the streets in all cases when it should be practicable to so lay them. The railway in question was constructed according to that requirement and a large amount of labor and material has been used, and much time spent in making a good roadbed. The cost to the plaintiff of removing its tracks to permit the construction of the sewer, and replacing it after the sewer is constructed, including the making of a good roadbed, would be about three thousand dollars. It would require years to make as good and safe a roadbed as the one now under the track, and the tearing up of the track would cause great inconvenience to patrons of the road, and would necessarily reduce the receipts of the plaintiff during the time that the sewer was being constructed. The reasons urged for placing the sewer in the center of the street are, that nearly all of the sewers in the city are placed in the centers of streets, and those placed at the sides are few, and so placed for exceptional reasons; that the contract made for building the sewer required it to be located in the center of the street; that to change it to the side would cause great expense, delay, and inconvenience; that the city has at all times required water pipes to be laid at one side of the streets, and gas pipes at the other, and that the property owners at one side of the street would be at greater expense than those on the other to connect with the sewer, if it is placed at the side.
2443 The evidence shows clearly that the sewer can be placed outside of the line of the railway without impairing, in any

respect, the efficiency of the sewer system, and that sanitary considerations do not require that it be placed in the center of the street. If the sewer is placed at the side, the increase of the cost of making a single connection between the sewer and the property on the side of the street furthest away would not exceed three dollars. Whether the contract for the new sewer requires that it be located in the center of the street we need not determine, as the contract provides that any change in the plans or specifications shall not work a forfeiture, and that the difference in cost caused by the changes shall be determined by the engineer and board of public works on the basis of the contractor's bid. The evidence shows that the expense of constructing the sewer at the side of the street need not be materially, if any, greater than to place it in the center. We are of the opinion that the reasons for placing it in the center of the street are not of sufficient importance to impose upon the plaintiff the burden of removing its track, and to expose the patrons of this line to the inconvenience and danger which would be caused by such a removal. In other words, we think the demand of the city is unreasonable. It is shown that, if the plaintiff will transfer its passengers at the point where the workmen engaged in constructing the sewer shall be at work, the cost of constructing it will not be materially increased, and the plaintiff avers its willingness to make such transfer. If required by the city, it will be provided for in the decree. It is said the plaintiff has an adequate remedy at law, but we think not. It has a right to protect its track and roadbed by an action of this nature. The decree of the district court is reversed."

2444 Respondent objects to the opinion as being *in*competent and immaterial, it not being an opinion in the case between the same parties as the case at bar, or involving the same issues.

Complainant offers in evidence the opinion of the Supreme Court of Iowa, rendered June 4, 1888, in the suit of the Des Moines Street Railway Company as plaintiff, and the Des Moines Broad Gauge Street Railroad Company and the City of Des Moines and others as defendants, as reported in Volume 71 on page 585, of the report as follows:

"*Per Curiam.*—At a prior term of this court, in certain causes therein pending, in which the plaintiff, the defendant railway Company and the City of Des Moines were parties, a decree was entered enjoining and restraining the City of Des Moines, the mayor and marshal/ thereof, and their successors in office, from 'interfering in any way with the construction extension or operation, by animal power, of the plaintiff's line of street railway upon any of the streets of the City of Des Moines; provided, this decree shall not be held to operate as a restraint upon the City of Des Moines of a proper police and equitable control over the streets of said city, and the power to make reasonable regulations as to the manner of construction of said lines, the places in the streets where the same shall be located, and the character and extend of service that shall be furnished thereon." Subsequent to entering such decree, and on

the twenty-fifth day of May, 1888, when the plaintiff was engaged in laying down its railway track along and upon Grand Avenue, a street in said city, the defendant William L. Carpenter, mayor, and Alfred Jarvis, marshal thereof, interrupted and ar-
2445 rested, or caused to be arrested, men in the employ of plaintiff, and engaged, under its direction, in laying down said track; and the plaintiff claims that in so doing the said Carpenter and Jarvis are in contempt of the authority and decree of this court, and the object of this proceeding is to punish them therefor. In response to a rule to show cause why they were not in contempt, the said Carpenter and Jarvis admitted that they had caused the arrest of the employés of the plaintiff, and had interrupted and prevented it from laying down its tracks upon said avenue, and justified the same under and by virtue of certain resolutions of the City of Des Moines. It appears from the record that the gauge of the plaintiff's road is three and one-half feet, and that such gauge was adopted, as the plaintiffs claim, under and by virtue of an ordinance of the city, passed in 1866, granting the plaintiff the exclusive right to lay its tracks in the streets of the city, and operate the same with animal power. The ordinance failed to prescribe the gauge of the road, but it is a conceded fact that the plaintiff adopted the gauge, laid its tracks, maintained and operated the same, for the last fifteen years, without objection upon the part of the city, until the passage of the resolution relied upon by said defendants in justification of their acts. There is nothing in the record showing that any other gauge of the road was ever used or operated by the plaintiff under said ordinance. On the twenty-third day of May, 1888, the city council passed a resolution declaring that the tracks of all street railroads occupying or desiring to occupy the streets of the city, shall be so laid that the same shall be of the standard or broad gauge, four feet eight and one-half inches wide. The declared ob-
2446 ject of this resolution was to 'protect the rights of the traveling public against a great nuisance and obstruction of travel.' On the succeeding day the city council adopted a preamble and certain resolutions, which are quite lengthy. The substance of the preamble, or recital of the facts upon which the resolutions are based, is that the plaintiff had in many specified particulars violated the ordinance of 1866, and therefore the council, by the adoption of the resolutions last referred to, declared all rights of the plaintiff under said ordinance forfeited, and directed an action to be commenced to enforce the forfeiture, and the plaintiff was forbidden and prohibited from operating its road, or laying down any tracks in the streets of the city. After the issuance of the rule to show cause, the city council adopted another preamble and resolutions not materially different from those last above referred to, except that the object and purpose of the council is declared to be that the forfeiture declared should not take effect until the passage of an ordinance, which is set out in the record, granting the plaintiff the right to operate its road by animal power upon certain terms and conditions materially different from the ordinance of 1866. The foregoing is a sufficient statement of the material facts, and counsel

have elaborately argued the questions involved. We are pressed for, and the necessities of the case seem to require an early decision. We, therefore deem it best to briefly state our conclusions, without, for the want of time, stating our reasons therefor, or the citation of authorities in support of our conclusions.

I. Under the pleadings and issues in the actions on which the decree of this court is based, we have a clear conviction that the city, and officers thereof, were, by such decree, enjoined from interfering with or in any manner preventing the plaintiff from
2447 laying its tracks on Grand Avenue so as to connect its system of road on the east and west sides of the Des Moines river.

II. That the resolutions passed by the city council since the rendition of the decree, and the proposed passage of the additional ordinance, affords no excuse or justification of the acts of the mayor and marshal.

III. We have not considered the right of the city to forfeit the contract, or whether the matters relied on justify the same, or whether the city has authority to forbid the laying down of any street railway in any street, or part of a street, in the city.

IV. We are of the opinion that the city does not now have the power to require the plaintiff to lay down such additional track as it may desire to, on a different gauge from that heretofore in use.

V. We are satisfied that William L. Carpenter, mayor, and Alfred Jarvis, marshal, of the city of Des Moines, disobeyed the decree of this court, for the reason only that they believed it their duty to do so under the resolutions and ordinances of the city. Therefore they should not be punished, except nominally, provided they will not further interrupt the plaintiff in laying down its track on Grand Avenue; and their assurance in writing, filed with the clerk, that they will not do so, will be regarded as sufficient. They, however, must pay costs."

Respondent objects to the opinion offered as being immaterial and incompetent, the opinion not having been rendered in a case between the same parties as the case at bar, nor in a case involving the same issues.

2448 Complainant offers in evidence Exhibit No. 150, being a resolution of the city Council of the City of Des Moines, adopted July 2nd, 1894, from Book R, pages 273-4 relative to the tracks on East Walker Street.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant to the complainant, and the city council having no power to grant the privileges thereunder to be granted by resolution.

Complainant offers in evidence Exhibit No. 151, being ordinance of the City of Des Moines, passed February 4, 1895, from Book R, page 485, entitled, An Ordinance Authorizing the Des Moines City Railway Company to use its railway tracks and cars for carrying the United States Mail, express and freight.

Objected to on the part of Respondent as being immaterial and incompetent, the city council of the city of Des Moines having no

power or right to grant the privileges granted in said ordinance; the ordinance having expired by its own terms; the rights and privileges have ceased and determined by the ordinance itself. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 152, record of acceptance of ordinance No. 711, passed April 1, 1895, from Book R, page 543, and resolution of the City council with respect thereto.

Objected to on the part of Respondent as being immaterial.

2449 Complainant offers in evidence Exhibit No. 153, resolution of the city council of Des Moines, of March 11, 1895, from Book R, page 514, requesting change of car signs on the Belt Line to read Highland Park.

Complainant offers in evidence Exhibit No. 154, being a resolution of the City Council of Des Moines, dated June 22, 1895, from Book S, page 420, granting authority to haul brick on Belt Line.

Objected to on the part of Respondent as being immaterial and incompetent, not being a grant to the complainant in this action, and the city council having no power or right to grant the privileges granted in said resolution by resolution or ordinance or in any other manner. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 155, resolution of the city council of Des Moines, dated October 5, 1895, from Book T, page 45, authorizing the hauling of brick on the Scott Street line.

Respondent makes same objection as last above. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 156, resolution of the City Council of Des Moines, of June 6, 1898, from Book U, page 102, relative to track on Jefferson Street.

Objected to on the part of Respondent as being immaterial and incompetent, the city council having no power or right to grant the privileges attempted to be granted in said resolution by resolution or in any other manner.

2450 No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 157, resolution of the city council of Des Moines, of November 3, 1898, from Book U, page 216, authorizing and directing the Des Moines City Railway Company to extend and operate its track from East 20th to Chesterfield, and requiring it to be operated in conformity with ordinance regulating street railways now in force.

Objected to on the part of Respondent as being immaterial, incompetent, the City Council of the City of Des Moines having no power or right to grant the privileges attempted to be granted in said ordinance by resolution or in any other manner, not having the right or power to extend the life of any franchise which had expired previously, by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 158, passed March 28, 1899, being Ordinance No. 960 of the City of Des Moines, requiring street railway companies or other persons operating the same to equip and provide their cars with fenders.

Objected to on the part of Respondent as being immaterial and incompetent, being a mere regulating ordinance, not a grant of any privilege or rights to the complainant company.

Complainant offers in evidence Exhibit No. 159, from the proceedings of the City Council of Des Moines, of 1898, and 1899, page 309, Roll Call No. 827, a resolution by the city council ac-
2451 cepting the proposition of W. H. Baily to revise the City ordinances.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 160, record of the City Council of the City of Des Moines, of April 17, 1899, from Page 26, roll call 932, a letter signed John MacVicar, Mayor, relative to approval of contract with W. H. Baily, to revise City Ordinances.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 161, being proceedings of the City Council, dated April 17, 1899, page 28, Roll call 944, showing acceptance and approval of contract with W. H. Baily, for revision of the City Ordinances.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 162, from the proceedings of the City Council of the City of Des Moines, dated June 5, 1899, page 97, Roll call 1219, being protest of citizens relative to loop at the end of East 6th Street and 9th Street car line.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 163, being report of committee of City Council on the protest, Exhibit No. 162, from proceedings of City Council, June 13, 1899, page 56, Roll call, 29.
2452 Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 164 communication from W. H. Baily, requesting further time for revision of ordinances, from the proceedings of the City Council, of August 7, 1899, at page 191, Roll call 1560.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant introduces in evidence Exhibit No. 165, communication from W. H. Baily as to revision of ordinances, from proceedings of City Council, September 25, 1899, page 263, Roll call 1830.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant introduces in evidence Exhibit No. 166, being record of proceedings of the city council, dated October 18, 1899, page 287, Roll call 1931, showing introduction of ordinance amending an ordinance, passed February 4, 1895, entitled An Ordinance Authorizing the Des Moines City Railway Company to use its tracks and cars for carrying U. S. Mail, freight, etc.

Complainant introduces in evidence Exhibit No. 167, from pro-

ceedings of the City Council, dated October 30, 1899; Roll call 2002, showing adoption of ordinance relative to recording and publication of ordinances.

Complainant introduces in evidence Exhibit No. 168, from the proceedings of the City Council of the City of Des Moines, dated November 17, 1899, page 358, roll call 2232 relative to future publication of ordinances.

2453 Complainant introduces in evidence Exhibit No. 169, proceedings of the City Council of Des Moines, of date December 17, 1899, page 397, showing adoption of ordinance for the publication of all ordinances and resolutions.

Complainant offers in evidence Exhibit No. 170, from the proceedings of the city council, dated December 14, 1899, page 396, Roll call 2335, being a communication from W. H. Baily, submitting for consideration the revision of ordinances as arranged by him and resolution of the City council in respect thereto.

Objected to on the part of Respondent as being immaterial and incompetent. No objection is made as to the exhibit being a copy.

Complainant offers in evidence communication of W. H. Baily, printed in the Revised Ordinances of the City of Des Moines, published by authority of the City as revised and arranged by W. H. Baily, found on page 3 thereof, as follows:

"Office of Baily, Ballerich & Preston, Attorneys at Law, Des Moines, Iowa.

To the Honorable Mayor and City Council of the City of Des Moines.

GENTLEMEN: I submit for your consideration the revision of the ordinances of the city as arranged by me preparatory to the publication thereof. This revision contains all ordinances now in force, as well as those recently passed and approved by the Mayor, with the following exceptions:

All ordinances granting right of way and special privileges to railroad companies have been omitted, but a schedule of such ordinances in force is inserted in the proper place. Also there have been omitted a large number of ordinances in force establishing, changing

2454 vacating, widening, narrowing and naming streets, alleys and highways, fixing curb and sidewalk lines, establishing special sidewalk grades, granting privileges to individuals in regard to drains, use of streets and alleys and the like; and other ordinances of a temporary, local or unimportant character.

To include these ordinances would greatly increase the cost of publication without any corresponding benefit to any one. Ordinances hereafter passed in time came be inserted in the proper places in the revision as far as practicable, otherwise they can be printed in an appendix at the end of the book.

I have also prepared and submit for your approval a short historical sketch, which, with a list of officers compiled by Mr. E. W. Woodruff, City Clerk, and the rules and order of business of the council, are to be printed in the forepart of the book.

An index is still to be prepared and the sections to be numbered, but this will be completed in time for the printer.

I also submit for your consideration proper forms of resolutions approving the revision and providing for the publication thereof.

Respectfully submitted, WM. H. BAILY."

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, said communication being no part of the revision.

Complainant offers in evidence resolution of the City Council, adopted December 14, 1899, approving the revised ordinances of 1900, and ordering publication thereof in Book form, as found printed on pages 4 and 5 of the Revised Ordinances of the
2455 City of Des Moines, of 1900, being Exhibit No. 171.

Objected to on the part of Respondent as being immaterial irrelevant and incompetent, the council having no power or right to adopt the revised ordinances by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Ordinance No. 960, passed March 28, 1899, as published in the Revised Ordinances of 1900, being sections 1287, 1288, 1289 of the said revision, at page 427; also Ordinance No. 1066, passed January 2, 1900, as published at page 428 of said revised ordinances, and being sections 1290, 1291, and 1292, thereto as follows:

"Street Railways.

Street Railway Regulations.

An Ordinance requiring street railway companies or other persons operating the same, to equip and provide their cars with fenders.

No. 960, passed March 28, 1899.

Be it ordained by the City Council of the City of Des Moines:

SECTION 1287. *Provide Fenders.*—SECTION 1. That every person or corporation controlling and operating any street railway in the City of Des Moines, shall equip the front end of each of its motor cars, used in carrying passengers along and over its said road or roads, with a fender of the basket type, (similar to the Providence Fender, manufactured by the Consolidated Fender Company, of Providence Rhode Island). Said fender shall be firmly attached to the front end of said motor cars and maintained thereon at all times when the same are employed in service on its road or roads, to the end that as far as may be, all persons may be pro-
2456 tected from injury or damage by coming in collision with said cars.

SEC. 1288. *Penalty.*—SECTION 2. That any person or corporation violating this ordinance, upon conviction thereof, shall be fined not less than $10, no- more than $50 for each offense. To run one car for any one day or part thereof, after the time herein provided without such fender, shall constitute a separate and distince offense.

SEC. 1289. *Take Effect.*—SECTION 3. This ordinance shall take effect and be in force from and after the first day of July, 1899, and after it has been published as required by law."

An Ordinance to regulating the cleaning of snow and ice from railway and street railway tracks in the City of Des Moines, and to require the removal of the same from the streets.

No. 1056. Passed January 2, 1900.

Be it ordained by the City Council of the City of Des Moines:

SEC. 1290. *Removal of Snow and Ice from Streets.*—SECTION 1. It shall be unlawful to deposit any snow, ice or other accumulations removed from any railway or street railway tracks, or from the space or right of way occupied by such tracks, upon or along any portion of any paved street or alley within the prescribed fire limits of the City of Des Moines, or to suffer any such snow, ice or other accumulations to be so deposited: provided, that snow, ice or other accumulations may be removed by plows, scrapers, brushes or shovels from such railway or street railway tracks and deposited temporarily upon the portion of the street or alley along such tracks, but all snow, ice or other accumulations so deposited upon any such street or alley shall be promptly removed therefrom within forty-eight hours thereafter.

2457 SEC. 1291. *Penalties.*—SECTION 2. Upon failure of any person, firm or corporation, operating or using any railway or street railway tracks in the City of Des Moines, to move from any paved street or alley along any such railway or street railway tracks, as herein provided, snow, ice or other accumulations so deposited thereon, the Board of Public Works shall have power to remove the same, and the cost thereof shall be charged to such person, firm or corporation and collected by an action at law therefor.

SEC. 1292. *Additional Penalties.*—SECTION 3. Any person, firm, or corporation violating any of the provisions of this ordinance, shall on conviction thereof, be punished by a fine of not less than $10, nor more than $100."

Objected to on the part of Respondent as being immaterial, irrelevant, the ordinances in question being mere regulating ordinances and not conferring any rights or privileges upon the complainant in this action, or any other street railway company.

Complainant offers in evidence from the printed copy of the Revised Ordinances, of 1900, published by order of the City of Des Moines, that part thereof, as follows, beginning at page 429, of Title XXII. Street Railways * * * Chapter II. Street Railway Franchises. Subdivision I. An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines. No. 63, passed December 10, 1866. (Chap. 53 R. O. 1889) (here follows ordinance).

From page 434 and a part of Chapter II and Subdivision I, as follows: "An Ordinance amending Ordinance No. 63 (being Chapter 53, Revised Ordinances of 1889) entitled, An Ordinance author-

izing the construction and operation of certain street rail-
2458 roads in and along the streets of the City of Des Moines, passed December 10, 1866. No. 492, passed March 8, 1890. Be it ordained by the City Council of the City of Des Moines:" (here follow ordinance referred to). * * *

From page 436, the same being subdivision 2 of Chapter I, as follows: "Subdivision 2. An Ordinance authorizing the Des Moines Broad Gauge Railway Company to construct, maintain and operate by electric or other motive power, other than animal or steam power, on any street, street railroads in the City of Des Moines, and defining the powers and duties of said Company. No. 399 passed December 20, 1887. (Chap. 57 R. O. 1889) Be it ordained by the City Council of the City of Des Moines:" (here follows ordinance)

From page 443 of said Revised Ordinances, as follows: "Subdivision 3. Street Railways—Consolidation Resolutions. Adopted September 5, 1889. (pages 532 to 534 R. O. 1889)" (here follows resolution of the City Council heretofore introduced in evidence, and acceptance thereof by the Des Moines Street Railroad Company, also introduced in evidence. * * *

From page 445, as follows: "Subdivision IV. An Ordinance granting to the Des Moines Rapid Transit Company the right to construct, maintain and operate its railway along and upon a certain street, and to cross certain streets in the City of Des Moines. No. 426, passed May 14, 1888. (Chap. 61, R. O. 1889) Be it ordained by the City Council of the City of Des Moines" (here follows ordinance) * * *

From page 446, as follows, the same being a part of Subdivision IV. "An Ordinance granting to the Des Moines Rapid Transit Railway Company the right to extend its railway along Grand Avenue in the City of Des Moines, Iowa, from the point where
2459 its railway as now projected will intersect said avenue, between West Seventeenth and Nineteenth streets, to the intersection of East Fifth street with said grand avenue. No. 440, passed August 21, 1888. (Chap. 62, R. O. 1889) Be it ordained by the City Council of the City of Des Moines:" (here follows ordinance) * * *

From page 452 as follows, "Subdivision V. An Ordinance granting to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway along and upon a certain street and to cross certain streets in the City of Des Moines. No. 429, passed May 16, 1888. (Chap. 59, R. O. 1889) Be it ordained by the City Council of the City of Des Moines:" (here follows ordinance) * * *

From page 454, the same being a part of Subdivision V, as follows: "An Ordinance granting to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets in the City of Des Moines. No. 445, passed September 20, 1888. (Chap. 60 R. O. 1889.) Be it ordained by the City council of the City of Des Moines:" (Here follows ordinance) * * *

From page 460, as follows: "Subdivision VI. An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of North Des Moines: Passed May 9, 1885) Chap. 21 R. O. North Des Moines) Be it ordained by the Town Council of the Town of North Des Moines:" (here follows ordinance) * * *

From page 465, as follows: "Subdivision VII. An Ordinance authorizing the Des Moines Broad Gauge Street Railway Company to construct and operate street railroads in the incorporated Town of North Des Moines. (Chap. 33 R. O. North Des Moines, passed July 6, 1886, as amended by Ordinance No. 42 passed August 8,
2460 1888; Ordinance No. 48, passed December 5, 1888; ordinance No. 50, passed February 18, 1889, and Ordinance No. 55, passed April 4, 1889) Be it ordained by the Town Council of the Town of North Des Moines:" (here follows ordinance) * * *

From page 469, as follows: "Subdivision VIII. An Ordinance to grant certain rights and privileges in the occupation of certain streets of the incorporated town of North Des Moines to the Des Moines Belt Line Railway Company. No. 54, passed February 28, 1889. Be it ordained by the town council of the incorporated town of Des Moines:" (here follows ordinance) * * *

From page 471, the same being a part of Subdivision VIII, as follows: "An Ordinance granting certain rights and privileges in the occupation of streets and alleys in the town of North Des Moines, Iowa, to the Des Moines Belt Line Railway Company. No 87, passed February 7, 1890. Be it ordained by the town council of the incorporated town of North Des Moines:" (here follows ordinance). * * *

From page 476 as follows: "Subdivision 9. An Ordinance authorizing the Des Moines City Railway Company to use its railways, tracks, and cars for carrying the United States Mail, express and freight, and for carrying material for the construction and operation of its roads. No. 711, passed February 4, 1895. Be it ordained by the City Council of the City of Des Moines:" (here follows ordinance). * * *

This offer is objected to on the part of Respondent as being immaterial and incompetent, for all the reason- heretofore urged at the time of the introduction of the particular ordinances here offered for the second or third time; and for the further reason that, in
2461 so far as this offer is made for the purpose of showing the reenactment of these ordinances in 1900, the same is incompetent for that purpose, as the book in question does not purport or attempt to reenact any ordinances or declare the same to be valid, but is simply a compilation of the ordinances which are on the books or were on the books of the City of Des Moines; for the further reason, that at the time of the adoption of the Revised Ordinances of 1900, the City Council of the City of Des Moines had no power to grant or renew or extend the rights or privileges of the Des Moines City Railways as they then existed to operate an electric street railway in the City of Des Moines.

Complainant offers in evidence Exhibit No. 172, being record of

proceedings relative to petition asking tracks to be removed from Jefferson Street, of June 4, 1900.

Complainant offers in evidence Exhibit No. 173, being record of proceedings on petition relative to extension of track on East Sixth and Ninth street, of July 2, 1900.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 174, being record of proceedings on resolution relative to extension of its loop around the south side of Court House Square, of July 23, 1900, page 269, Roll call No. 886.

Complainant offers in evidence Exhibit No. 175, being record of proceedings of the City Council, of July 31, 1900, relative to extension of the tracks of the Des Moines City Railway Com-
2462 pany on the south side of the Court House Square, being Roll Call No. 955.

Objected to on the part of Respondent as being immaterial and incompetent, the City Council of the City of Des Moines having no power, right or authority *the* grant the rights and privileges granted in said resolution, Roll Call, No. 955, by resolution. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 176 being certified copy of proceedings of the Board of Supervisors of Polk County, Iowa, on the 7th day of September, 1899, relative to extension of the street car tracks around the court house square.

Objected to on the part of Respondent as being immaterial and incompetent, Polk County not being a party to this action, it not being an action by the City Council of the City of Des Moines; the Board of Supervisors of Polk County having no power to grant any rights or privileges to the Des Moines City Railway Company upon the streets of the City of Des Moines. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 177, a record of petition and proceedings thereon of C. C. Nourse and others, relative to extension of street car service on 29th street, being Roll Call 1274, page 403. Dated September 26, 1900.

Complainant offers in evidence Exhibit No. 178, being a record of a resolution, Roll Call, No. 793, passed June 20, 1901, authorizing the extension of tracks on East Walker Street on Easton
2463 Boulevard.

Objected to on the part of Respondent as being immaterial and incompetent, the city council having no power or right to authorize the Des Moines City Railway Company to extend its tracks or to build and maintain the same on any street of the City of Des Moines by resolution or otherwise. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence proceedings of the City Council, Exhibit No. 179, of date October 7, 1901, Roll Call 1394 page 485, relative to a communication from George F. McKay, Trustee, with respect to the construction of a line of railway and franchise for the same.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 180, proceedings of the City Council, of date October 7, 1901 from page 485, being Roll Call No. 1395, relative to resolution for the submission to a vote of the question of granting a franchise to George F. McKay, Trustee.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 181, being record of the proceedings of the City Council, of October 7, 1901, from page 490, Roll Call, 1412, being report of the Committee of the Whole, on proposed resolution for submission to a vote of the question of granting to George F. McKay, a franchise.

Objected to on the part of Respondent as being immaterial and irrelevant.

2464 Complainant offers in evidence Exhibit No. 182, being proceedings of the City Council, of October 11, 1901, Roll Call, 1437, Report of Committee on Waterworks and Railroads, relative to proposed resolution for submission to a vote the question of granting a franchise to George F. McKay, trustee.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 183, proceedings of the City Council, of November 8, 1901, Roll Call 1558, page 544, being report of water works and railroad committee on proposed resolution for submission *of* vote the question of granting franchise to McKay, trustee.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 184, being resolution of the City Council, of November 11, 1901, page 559, Roll Call, 1612, relative to application of McKay, for franchise.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 185, being resolution of City Council, of December 3, 1901, Roll Call 1701, from page 593, relative to applicants for street car franchise.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 186, a proposed ordinance, granting to George F. McKay, Trustee, the right to construct, maintain and operate a street railway in the city of Des Moines, filed February 3, 1902.

2465 Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, being merely a proposed ordinance which was never passed or adopted by the city council of the City of Des Moines; for the further reason, the complainant in this action — no relation to it. No objection is made on the ground that the exhibit is a copy.

It is agreed that the foregoing exhibit No. 186, is a copy of an ordinance filed on the 3rd day of February, 1902, and submitted to the

Committee of the Whole for consideration, which afterwards was withdrawn on the 24th day of February, 1902.

Complainant offers in evidence Exhibit No. 187, record of the City Council, of December 10, 1901, Roll Call, 1748, from page 692, relative to Kingman Boulevard and tracks thereon.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the City Council having no power to authorize the street railway company at that time to construct its tracks, erect its poles and string its wires along any street in the City of Des Moines.

Complainant offers in evidence Exhibit No. 188, being proceedings of the City Council, of January 23, 1902, Roll Call 1946, from page 671, relative to the construction of street railway tracks and paving on Fourteenth Street and other streets.

Objected to on the part of Respondent as being immaterial and irrelevant.

2465 Complainant offers in evidence Exhibit No. 189, being resolution of the City Council, of March 14, 1902, Roll Call 2166, from page 764, relative to building track on second street.

Now at 5 o'clock P. M., of this day, the further taking of testimony is adjourned until 9 o'clock, March 12, 1906.

MARCH 12, 1906—9 o'clock a. m.

Pursuant to the adjournment the further taking of testimony on the part of Complainant is resumed as follows:

Complainant offers in evidence Exhibit No. 190, being an ordinance of the City of Des Moines, No. 1155, passed April 4, 1902, being an ordinance to straighten Seventeenth Street, between Grand avenue and Ingersoll Avenue.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit 191, ordinance No. 1175, entitled An Ordinance granting to the Des Moines City Railway Company the right to transfer freight and express matter over its road, extending east from the Chicago & Northwestern Railroad along Walnut street to the State Fair Grounds, passed August 5, 1902.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the City Council of the City of Des Moines having no power or right to grant the privileges attempted to be granted in said ordinance; for the further reason, that the grant therein contained has heretofore expired, as shown by the terms of said ordinance. No objection is made on the ground that the exhibit is a copy.

2467 Complainant offers in evidence Exhibit No. 192 from the record of April 20, 1903, page 81, being a communication from the Board of Public Works relative to the extension of the tracks of the Des Moines City Railway Company, and the action of the City Council with respect thereto, being Rall Call 139-140.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 193, being record of the City Council, of April 27, 1903, from page 130, Roll Call 197,

resolution requesting the Des Moines City Railway Company to relay and extend its tracks on a portion of Grand Avenue.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the City Council of the City of Des Moines having no right or power to grant the privileges attempted to be granted in said resolution by resolution or otherwise. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 194, being record of the City Council of May 4, 1903, from page 143, Roll Call 229, being a communication from the Des Moines City Railway Company accepting the resolution, Exhibit No. 193, and agreeing to lay a track on Grand Avenue, from the West Line of 6th street, to the east line of East Ninth street, notifying that the company had commenced work thereon.

Objected to on the part of Respondent as being immaterial.

2468 Complainant offers in evidence Exhibit No. 195, record of the City Council, of May 28, 1903, Roll Call 438, of the Board of Public Works, as to paving on Grand Avenue from West Sixth to East Ninth.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 196, being Ordinance No. 1214, passed June 1, 1903, amending an ordinance relative to moving houses and buildings along and across the streets.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 197, a record of adoption of Ordinance, Roll Call, 523, passed June 8, 1903, said ordinance being an ordinance, entitled, An Ordinance amending an Ordinance, No. 711, passed February 4, 1895, and entitled, an Ordinance authorizing the Des Moines City Railway Company to use its railways, tracks and cars for carrying the United States mails, express and freight.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the city council of the city of Des Moines having no right or power to grant the privileges attempted to be granted in said ordinance. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 198, being the ordinance referred to in Exhibit No. 197, designated as Ordinance No. 1216, passed June 8, 1903.

Respondent interposes the same objection as last above.

2469 Complainant offers in evidence Exhibit No. 199, being record of the City Council of June 15, 1903, Roll Call 561, requiring the Board of Public Works to notify the Des Moines Street Railway Company to pave a portion of East Walnut Street.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 200, being record of the City Council of June 15, 1903, Roll Call 562, a resolution instructing the Board of Public Works to notify the Des Moines City Railway Company to pave portions of East Twelfth street.

Objected to on the part of respondent as being immaterial.

Complainant offers in evidence Exhibit No. 201, being a record of the City Council, of August 3, 1903, Roll Call 854, a resolution instructing the Board of Public Works to notify the Des Moines City Railway Company to pave a portion of East Walnut street.

Respondent interposes the same objection as last above made.

Complainant offers in evidence Exhibit No. 202, record of the City Council, of August 17, 1903, requesting the extension of the Fourth Street car line.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 203, record of the City Council, of September 8, 1903, Roll Call 1113, being a petition for additional service on Eleventh & Twelfth and Clark street lines.

2470 Objected to on part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 204, ordinance No. 1232 passed September 8, 1903, entitled, An Ordinance to prevent accidents at the street car Waiting Room.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 205, record of the City Council of the City of Des Moines, September 21, 1903, Roll Call, 1169, being preamble and resolution relative to extension of Seventh street line.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the City Council of the City of Des Moines having no power or right to authorize the laying of the tracks referred to in said resolution by resolution or otherwise. No objection is made on the ground that the Exhibit is a copy.

Complainant offers in evidence Exhibit No. 206, being proceedings of the City Council of September 24, 1903, directing the Auditor to pay up paving.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 207, record of the City Council of September 28, 1903, relative to paving and Seventh Street car line extension.

Objected to on the part of Respondent as being immaterial and irrelevant.

2471 Complainant offers in evidence Exhibit No. 208, record of the City Council, of November 2, 1903, Roll Call 1456, being resolution directing the Auditor to draw warrants for paving.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 209, record of the City Council of November 17, 1903, Roll Call 1538, being a resolution relative to the tracks and poles of the street car company upon the Melan Arch Bridge.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the city council of the City of Des Moines having no power or right to grant the privileges attempted to be granted in such resolution by resolution or otherwise. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 210 record of the City Council, of March 3, 1904, Roll Call 1866, relative to fixing the value of the pavement on certain streets on which street car tracks were to be laid.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 211, being record of the City Council, of May 26, 1904, Roll Call 502, determining the value of pavement on Second Street.

Objected to on the part of Respondent as being immaterial and irrelevant.

2472 Complainant offers in evidence Exhibit No. 212, record of the City Council of June 20, 1904, Roll Call 675, instructing the auditor to draw warrants for paving.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 213, proceedings of the City Council, July 5, 1904, Roll Call 833, showing acceptance of the Des Moines City Railway Company of the change of right of way on West Seventeenth street, from Grand to Ingersoll Avenue.

Objected to on the part of Respondent as being immaterial.

Complainant offers in evidence Exhibit No. 214, record of the proceedings of the City Council, of August 29, 1904, Roll Call 1257, relative to change of specifications for paving on West Thirteenth Street.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 215, ordinance No. 1282, passed September 19, 1904, entitled, An Ordinance to amend an Ordinance, No. 647, the same being Chapter I, Title XIII, of the Revised Ordinances of the City of Des Moines, and entitled an Ordinance to regulate electric wires, poles, fixtures thereforc.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 216, record of the proceedings of the City Council, March 30, 1905, Roll Call 2604,

2473 showing petition as to street car tracks on Maine street and proceedings thereon.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 217, proceedings of the City Council of May 1, 1905, Roll Call 225, relative to car tracks on Bluff Street.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 218, proceedings of the City Council May 1, 1905, Roll Call 287, being a resolution granting to the Des Moines City Railway Company the privilege of putting Madison Avenue to grade.

Objected to on the part of Respondent as being immaterial, irrelevant and incompetent, the city council of the City of Des Moines

having no right or authority to grant the privileges attempted to be granted in such resolution by resolution or otherwise. No objection is made on the ground that the exhibit is a copy.

Complainant offers in evidence Exhibit No. 219, being proceeding of the City Council of the City of Des Moines dated May 15, 1905, Roll Call 394, determining the value of paving on streets on which tracks were extended.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 220, resolution
2474 of the City Council, of March 20, 1905, Roll Call 2502, requiring removal of car tracks on Front street.

Complainant offers in evidence Exhibit No. 221, proceeding of the City Council, August 7, 1905, Roll Call 1082, instructing Auditor to pay property owners paving tax.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 222, proceeding of the City Council, August 12, 1905, roll call 1168, relative to Walnut street paving on car tracks.

Objected to on the part of Respondent as being immaterial and irrelevant.

Complainant offers in evidence Exhibit No. 223, proceedings of the City Council of August 24, 1905, Roll Call 1233, resolution relative to paving West Fourth Street.

Objected to on the part of Respondent as being immaterial and irrelevant.

It is agred that Exhibit No. 224, is a printed copy of the Revised Ordinances of the City of Des Moines of 1900, published by authority of the City.

Complainant offers in evidence Exhibit No. 224.

At this time, 11 o'clock A. M., by agreement of the parties, the further taking of testimony herein was continued until Monday, March 19, 1906, 10 o'clock A. M.

2475 MARCH 19, 1906—10 o'clock a. m.

Now, towit, this 19th day of March, 1906, at 10 o'clock A. M. by agreement of the parties, the further taking of the testimony herein is continued until Thursday, March 22nd, 1906, at 9 o'clock A. M.

Thursday, March 22nd, 1905, by agreement of the parties, the further taking of testimony herein is continued until Tuesday April 17th, 1906.

Now, to-wit, on the 17th day of April, 1906, at 10 o'clock A. M. by agreement of the parties, the further taking of testimony herein was resumed before Emma K. Blaise, one of the Examiners agreed upon herein, as follows:

Mr. F. C. TATE, of lawful age, being duly sworn, examined in chief by W. L. READ, Esq., testified as follows:

Int. 1. Your name is F. C. Tate?

Answer. Yes sir.

Int. 2. Where so you live?

Answer. 1110 East Sixth Street.

Int. 3. How long have you lived in Des Moines?

Answer. About twenty years.

Int. 4. What is your business and occupation?

Answer. Draftsman.

Int. 5. What experience have you had in making maps in the city of Des Moines and in making maps generally.

Answer. Well, in what way?

Int. 6. In any way, have you made maps?

Answer. Yes, I have made maps.

Int. 7. What maps?

2476 Answer. I have made maps for the Commercial Exchange.

Int. 8. Did you make a map for the Commercial Exchange, and if so, what was it a map of?

Answer. I made a map for them of the City of Des Moines.

Int. 9. Is the map which has been marked by the Examiner "Complainant's Exhibit A" a map of the City of Des Moines prepared by you for the Commercial Exchange?

Answer. It is.

Int. 10. That map is also indicated as number naught, isn't it?

Answer. Yes sir.

Int. 11. When was this map prepared?

Answer. In 1902.

Int. 12. From what source did you obtain the data with respect to the different streets and plats and portions of the City of Des Moines?

Answer. From the official plats on file in the Auditor, Recorder and City Engineer's office.

Int. 13. Does it correctly represent the parts, divisions and portions of Des Moines as shown by such plat?

Answer. Yes sir.

Int. 14. From what source did you say you obtained your information?

Answer. I got the information from the official plats on file in the Auditor's, Recorder's and City Engineer's office.

Int. 15. Did you consult the plats in the Recorder's office?

Answer. Yes sir.

Int. 16. You say that the plat Exhibit "A" correctly represents and portrays the city and its divisions, streets and alleys, as shown by the plats you have referred to?

Answer. Yes sir.

Int. 17. Have you any knowledge in general, any general knowledge with respect to whether it is a correct representation—

2477 have you a general knowledge of the situation of Des Moines so that you can say it is a correct representation of the City of Des Moines?

Answer. I don't believe I quite understand your question.

Int. 18. In what respect do you not understand?

Answer. Well, according to the plates on file—and it had been examined by real estate men all over the city; there was about two hundred postal cards sent out by the Commercial Exchange to

prominent real estate men all over the city asking them to come in and examine the map and in all that number there was not a single criticism—not a single man that I know of found anything wrong with it.

Int. 19. You have lived in Des Moines twenty years?

Answer. Yes sir.

Int. 20. And you are familiar generally with the location and situation of Des Moines?

Answer. I am.

Int. 21. And from your knowledge from that sou-ce, is it a correct representation of the city of Des Moines?

Answer. From my knowledge and belief it is.

Int. 22. Do you know whether the may, Exhibit "A" has been circulated as being a correct map of the City of Des Moines?

Answer. It has, yes sir.

Int. 23. Has the map, Exhibit "A," been in general use and circulation as a map of the city of Des Moines?

Answer. It has.

Int. 24. You say this map was made in 1902.

Answer. Yes sir.

Int. 25. Had there been one prior to that?

Answer. Yes sir.

2478 Int. 26. Had there been a map prior to that?

Answer. Yes, sir.

Int. 27. How long prior?

Answer. I think about six or seven years prior.

Int. 28. Is that a correct revision of the former map?

Answer. It is.

Int. 29. For the former map the information was obtained from the same source?

Answer. Yes sir.

Int. 30. How many revisions of the map of the city of Des Moines have you made?

Answer. Only one.

Int. 31. And this is that revision?

Answer. Yes sir.

Int. 32. The former map, had that been in general use and been accepted and regarded as a correct map of the city of Des Moines.

Answer. It was.

Int. 33. Since the map, Exhibit "A," has been issued, has there been any other map of the city of Des Moines in general use?

Answer. Not to my knowledge.

Int. 34. Does the may Exhibit "A" purport to show the location of the street railways in the city of Des Moines?

Answer. To the best of my knowledge it does.

Int. 35. Does it purport to show the location?

Answer. Yes sir.

Int. 36. From whom and from what source did you obtain the information with reference to the street railways?

Answer. The Commercial Exchange got the information, as I understand it, from the City Railway Company.

2479 Int. 37. I call your attention to one feature of Exhibit "A." Here the railway projected is indicated as extending east from Hull street to the Poor Farm road and thence north on the Poor Farm road. Was there such a line as that constructed?

Answer. No, sir; that was a proposed line, as I understand it, which was not built.

Int. 38. Mr. Tate, I call your attention to the circles radiating on the map, what do they indicate?

Answer. They indicate half miles.

Int. 39. From what is the central station.

Answer. Yes, from the new court house.

Int. 40. The county court-house square, you mean?

Answer. Yes, not the one on Third Street.

Int. 41. Does the map correctly indicate the boundaries of the city limits as extended?

Answer. It does.

Int. 42. With the exception notes as to the proposed line which was not built, does the map correctly indicate the location of the various street railways in the city, so far as you know?

Answer. It does to that date, so far as my knowledge goes.

Int. 43. You have some knowledge as to the location of the street car tracks in the city?

Answer. I have.

Int. 44. The Commercial Exchange is an organization of business men for the purpose of promoting the business interests and welfare of the city of Des Moines, is it?

Answer. Yes.

2480 Complainant offers in evidence Exhibit "A," being the map of the City of Des Moines which has been identified by the witness.

Objected to on part of Respondent for the reason that the same is immaterial, incompetent, and not binding on the Respondent, and for the further reason that the same has never been approved by the city Council, and the further reason that the witness has not shown himself competent.

Int. 45. I call your attention to the map which has been marked Exhibit "B" and ask you to state if that is a map of the City of Des Moines identical with Exhibit "A" except with respect to the additional matter shown thereon?

Answer. Yes, it is.

Int. 46. By whom was the additional matters shown upon the map drawn and prepared?

Answer. I did it.

Int. 47. What, Mr. Tate, does the map purport to show in addition to being a map of the city of Des Moines?

Answer. The various towns and suburban towns around the city of Des Moines, as shown on the map.

Int. 48. You mean the towns, suburban towns that were incorporated in the City of Des Moines at the time of the extension of its limits?

Answer. Yes sir.

Int. 49. Are such cities and towns indicated by appropriate words on the maps and the lines?

Answer. Yes sir.

Int. 50. What does the may Exhibit "B" purport to show with respect to the street railway system?

Answer. As they existed during that time, at the date it was made, as shown on the map.

2481 Int. 51. Do you refer to the railways as they existed up to 1898?

Answer. Yes sir.

Int. 52. Then does the map purport to show the railroads constructed and existing up to the year 1889?

Answer. Yes sir.

Int. 53. How are those railroads indicated?

Answer. In colors.

Int. 54. And how may we know from the colors what line. Line of railway or name of company is indicated or designated?

Answer. By the key as shown on the map.

Int. 55. By the key do you refer to the markings on the right hand margin of the map under the word "key" followed by the words "Des Moines Street Railway Company," and then a red mark and other appropriate words following, is that the key?

Answer. Yes sir.

Int. 56. Does the space in the center of the city indicated by the heavy line indicate the original corporate limits of the city?

Answer. It does.

Int. 57. That part is marked "Des Moines"?

Answer. Yes.

Int. 58. And the line is marked, "Corporation line from March 1857 to July 1890"?

Answer. It is.

Int. 58. Does the line on the margin which is marked "Corporation line, July 5, 1890," show the corporation line of the city of Des Moines as extended by the annexation?

Answer. It does.

2482 Int. 59. The different cities, incorporated towns annexed to Des Moines are indicated by lines and by the corresponding and appropriate name?

Answer. They are, yes sir.

Int. 60. The lines on the map indicating the separate corporations show the limits of the corporations as they existed before the annexation to the city of Des Moines, do they?

Answer. Yes sir.

Int. 61. Was the map exhibit "C" prepared by you?

Answer. Yes sir.

Int. 62. That purports to show what, Mr. Tate, in addition to the representations as to the city of Des Moines?

Answer. The lines that existed during the time as shown by the dates on the map.

Int. 63. It purports to show the Des Moines Street Railroad Company from November 1889 to July 1, 1893?

Answer. Yes sir.

Int. 64. How, Mr. Tate, are the various lines of street railway indicated?

Answer. By colors as shown by the key on the map.

Int. 65. By the key you refer to the colors and words on the right hand margin following the word "key" do you?

Answer. Yes sir.

Int. 66. Was the map Exhibit "D" prepared by you?

Answer. Yes sir.

Int. 67. What does that purport to show in addition to the representation of the city of Des Moines?

Answer. The various lines as they existed during that time.

Int. 68. During the time indicated on the map, that is to say, from July 1, 1893, to January 1, 1898?

2483 Answer. Yes sir.

Int. 69. How are the various matters with respect to the Street Railway indicated on the map?

Answer. By the key.

Int. 70. You refer to the writing and colorings following the word "key" on the right hand margin?

Answer. Yes, sir.

Int. 71. By this, then, the tracks as they existed July 1, 1893, are indicated by light red line?

Answer. Yes.

Int. 72. And track re-laid?

Answer. By heavy black lines.

Int. 73. Extension of new tracks?

Answer. By black lines crossed.

Int. 74. Isn't such a line referred to as a ladder line?

Answer. Sometimes it is, yes.

Int. 75. The Old Belt Line is indicated by blue?

Answer. Yes sir.

Int. 76. And tracks removed by what?

Answer. By green.

Int. 77. Was the map marked Exhibit "E" prepared by you?

Answer. Yes sir.

Int. 78. What does that purport to show in addition to the representation of the city?

Answer. It shows the line as it existed during the date as shown on the map?

Int. 79. The street railway line?

Answer. Yes sir.

Int. 80. And do I understand you to say that it is a map of the Des Moines City Railway showing old tracks, extensions and

2484 re-laying, both single and double tracks from January 1, 1898, to December 31, 1905?

Answer. Yes sir.

Int. 81. The different matters represented are indicated by the key on the right hand margin, are they?

Answer. They are, yes.

Int. 82. Was the map Exhibit "F" prepared by you?

Answer. Yes.

Int. 83. And does it purport to show, what does it purport to show in addition to the representation of the city of Des Moines with respect to street railways?

Answer. The tracks as they existed during the period or date as shown on the map.

Int. 84. It is a representation of the Des Moines City Railway tracks as they existed on the 21st day of December, 1905?

Answer. Yes sir.

Int. 85. And purports to show single and double tracks?

Answer. Yes.

Int. 86. Single indicated by blue?

Answer. Yes.

Int. 87. And double tracks by red?

Answer. Yes, sir.

Int. 88. From what source did you obtain the data for the respective maps "B" "C" "D" "E" and "F" so far as the date concerning the street railway tracks is concerned?

Answer. From plats in the Engineer's office of the Des Moines City Railway Company and from Mr. Hippee and Mr. Polk.

Int. 89. Have you some personal knowledge in addition?

Answer. Yes, sir.

Int. 90. To the extent that your personal knowledge goes, these maps correctly represent the true situation, do they?

2485 Answer. Yes sir.

Int. 91. Does your personal knowledge extend as to all matters, or is it limited?

Answer. In a general way it is.

Int. 92. In a general way your knowledge, personal knowledge extends as to all matters indicated on the maps?

Answer. Yes sir.

Cross-examination by M. H. COHEN, Esq.:

C.-int. 1. Frank, you stated you prepared these maps from the official plats in the Auditor's office. What do you mean by that? Do you mean the official plats, or do you mean the plats of all the additions and sub-divisions.

Answer. Official plats—we go mostly by the Recorder's plats in the Recorder's office, but a great many times we have to refer to the Auditor's office on account of some distance may not be shown, some plats may not be quite clear.

C.-int. 2. And this includes not only the official plats recorded in the office of the County Auditor, but also the recorded plats as shown in the Recorder's office.

Answer. Yes sir.

C.-int. 3. Did you get any of this information from the office of the City Engineer?

Answer. Yes sir.

C.-int. 4. Now, you say you got some information from the Commerical Exchange; what was the nature of that information?

Answer. As to factories and various industries as shown on the map and the street railway as to that date.

C.-int. 5. Now, the lines indicated in colors on those maps show the streets on which the street railway lines are laid, did you get that from the Commerical Exchange?

2486 Answer. Yes, at the time the map was made, 1902.

C.-int. 6. That refers then to Exhibit "A?"

Answer. Yes.

C.-int. 7. Now, Exhibit- "B" "C" "D" "E" and "F" the information you impart on those maps, that was gotten from the Street Railway Company and not from the Commerical Exchange?

Answer. Yes sir.

C.-int. 8. Did you ever have any experience in preparing maps for laying out additions?

Answer. I am not a surveyor.

C.-int. 9. All these maps indicate here is what shows on the records which you have searched at the court-house and City Engineer's office?

Answer. They are.

C.-int. 10. Where did you get your information as to the location of these circles?

Answer. That was scaled. I checked them up according to the scale of Miles.

C.-int. 11. Who did the scaling?

Answer. I did it myself.

C.-int. 12. Does this map show, or any of these maps show what scale the maps are drawn to?

Answer. They *are*.

C.-int. 13. What scale are they drawn to?

Answer. The original map was drawn to a scale of about five and one-half inches to the mile.

C.-int. 14. How about the subsequent maps?

Answer. They are reduced to no scale, but to fit the size of the paper?

C.-int. 15. Then by these maps you couldn't tell the number of miles of track?

2487 Answer. You could by making a scale to fit the maps?

C.-int. 16. But from these maps as they are at the present time you couldn't tell?

Answer. No, sir.

(Sgd.) F. C. TATE.

Subscribed in my presence and sworn to before me this 10 day of Sept., 1906, by the said F. C. Tate.

[SEAL.] (Sgd.) EMMA K. BLAISE,
J. P. BLAISE,
Examiners and Notary Public in and for Polk County, Iowa.

Mr. G. B. HIPPEE, of lawful age, being duly sworn, examined in chief by W. L. READ, Esq., testified as follows:

Int. 1. You may state your name, place of residence and occupation?

Answer. George B. Hippee, Des Moines, Iowa; general manager of the Des Moines City Railway Company.

Int. 2. Did you reside in Des Moines in 1886?

Answer. Yes, sir.

Int. 3. Have you resided in Des Moines continuously ever since that time?

Answer. Yes, sir.

Int. 4. Were you interested in the purchase of the property of the Des Moines Street Railway Company, including what is
2488 known as the Turner franchise, which was made by the Des Moines Street Railway Company in 1886?

Answer. Yes. I was associated with Mr. Frank A. Sherman, Walter McCain and others in making said purchase.

Int. 5. I call your attention to the signed opinion of Mr. Galusha Parsons and the memorandum attached to it signed by Mr. J. S. Polk, which has been introduced in evidence, and will ask you to state in what connection that opinion was obtained from Mr. Parsons. The opinion referred to is marked Exhibit No. 13.

Objected to on part of Respondent as being immaterial and incompetent.

Answer. This opinion was obtained from Mr. Parsons, who was then one of the leading lawyers and attorneys in Des Moines and in Iowa, shortly prior to the time of the purchase of the property from the Des Moines Street Railway Company in 1886.

Int. 6. Mr. Hippee, you knew of the opinion at the time and of Mr. Polk's concurrence in it?

Answer. Yes sir.

Int. 7. State, if you know, how the memorandum signed by J. S. Polk, came to be appended to this opinion?

Answer. Mr. Polk, was a lawyer; he had not long before this time retired from active practice and was recognized as a lawyer of ability, and he also was personally familiar with the circumstances attending the passage of the so-called Turner ordinance.

Int. 8. To what extent was the purchase from the Des Moines Street Railway Company in 1886 made in reliance upon these opinions?

2489 Objected to on part of Respondent as being immaterial.

Answer. The greater part of the cash, which was paid to Doctor Turner or to his Company, was secured from the Hon. John Sherman, of Ohio,—then United States Senator or Secretary of the Treasury, I don't recall which,—and friends of his who refused to make any investment before this opinion of Mr. Parsons had been obtained.

Mr. COHEN: May I ask whether you are referring to the memo-

randa which you have in your hands merely to refresh your recollection.

WITNESS: Yes, that is right.

(Answer to Int. 8 continued)

Before the opinion was obtained, the Hon. John Sherman and his associates in Ohio either had business relations or knew of Mr. Parsons prior to this time in a professional way and had a very high opinion as — his ability, and they insisted on knowing something as to his opinion in regard to the status of the franchises before they would invest.

Int. 9. F. A. Sherman was a nephew of John Sherman?

Answer. Yes, sir.

Int. 10. Mr. Parson had originally come from Ohio, had he not?

Answer. I am not sure about that. As I remember it he was acquainted with the Shermans, or with John Sherman either through business or socially in some way.

Int. 11. Then is it your statement that Mr. Sherman made the condition that he should have Mr. Parsons' opinion on the nature of the franchise before they would make investments?

2490 Answer. Yes, sir; Mr. John Sherman made that a condition. He wanted to know his opinion as to the legal status of the franchise.

Int. 12. During the period that intervened between the purchase from Doctor Turner in 1886 and what has been referred to as the consolidation on September 5th, 1889, what if any part did you take in the active management of the Des Moines Street Railroad Company?

Answer. None whatever. I was actively engaged in the banking business at that time as Cashier of the Des Moines Savings Bank. I was the Treasurer of the Des Moines Street Railroad Company but I gave this business no attention, no personal attention, except that the funds were deposited in our bank.

Int. 13. What personal knowledge, if any, have you as to the controversies that existed during the period from 1886 to 1889 between the City and the Railroad Company?

Answer. Why, I have very little personal knowledge as to any of these difficulties. I knew of them in a general way; I knew that the streets were torn up and that there were constant differences, but I don't think I ever saw any of the controversies or witnessed any of the arrests, and I was not arrested myself.

Int. 14. You knew of them?

Answer. I knew in a general way that the officers of the Company had been arrested for attempting to lay tracks on the streets.

Int. 15. You knew that there was rivalry between the two companies?

Answer. Yes.

2491 Int. 16. What relation did you sustain at any time to the Des Moines Street Railroad Company in connection with its active operation and when did that relation arise, and how long did it continue?

Answer. Just after Mr. J. S. Polk acquired an interest in the prop-

ty in connection with the consolidation in September, 1889. The rst of October, 1889, I became the general manager of the property id continued to be general manager until the property was acquired om the Des Moines Street Railroad Company by the Des Moines ity Railway Company, and I have been general manager for the es Moines City Railway Company since its organization to the resent time.

Int. 17. Who had charge of the work of construction in connec-on with readjusting and connecting up the various street railroads f Des Moines after the consolidation in 1889?

Answer. I did, as the general manager of the Des Moines Street ailroad Company.

Int. 18. I call your attention, Mr. Hippee, to the map which has een marked "Exhibit C," and which is indicated as map #2, and owing the Des Moines Street Railroad Company from November, 889, to July 1893, and ask whether that indicates the changes and ddition made in and to the tracks during the period from 1889 to 893?

Answer. It does.

Int. 19. How are the changes indicated?

Answer. Well, the Broad Gauge tracks are indicated by yellow on at map; the Narrow Gauge horse car tracks are indicated by red; he Des Moines Belt Line Company's tracks are represented by blue; the Des Moines River line by blue; the Des Moines & Sevas-492 topol by purple; the Des Moines Rapid Transit Railway Company by orange; the Des Moines Suburban by dark red. The acks that were relaid in that period are indicated by a black line. The extension or new tracks are indicated by a ladder line, and the acks removed are indicated by a green line.

Int. 20. Does the map correctly show the line of the various street ilway companies as indicated by the coloring?

Answer. It does.

Int. 21. How are the tracks which were owned by the Electric ompany prior to the consolidation indicated on this map?

Answer. By yellow.

Int. 22. Were any of these tracks taken up when the companies ere consolidated, if so, how are those tracks indicated?

Answer. They were taken up after the consolidation and during he period between 1889 and 1893, and those are indicated by a green ne along side of either the Broad Gauge track indicated by yellow, r the Narrow Guage which is indicated by light red, and the green ne represents—wherever the green line is shown it indicates that hat track was removed.

Int. 23. The tracks as thus indicated were taken up?

Answer. Yes, sir.

Int. 24. And that marking then indicated all tracks taken up and emoved?

Answer. Yes, sir.

Int. 25. Mr. Hippee, as to the Belt Line, the River Line, the evastopol line and the Rapid Transit and Surburban Companies,

the tracks are indicated upon the map in the colors as shown by the key to the map?

Answer. They are.

Int. 26. And the extensions and new lines, how are they indicated?

2493 Answer. By the ladder lines.

Int. 27. Where tracks were relaid, including Narrow Gauge tracks, as Broad Guage tracks, that is indicated as you have heretofore stated?

Answer. Yes, by the black line along side of either the yellow line or the red line.

Int. 28. The yellow indicates removal, and the black line relaid?

Answer. Yes, sir; no, the green line removal.

Int. 29. And the black line indicates relaid?

Answer. Yes.

Int. 30. And the lines as thus indicated by black were relaid during that period?

Answer. Yes, sir.

Int. 31. The extension lines as indicated by the ladder line were constructed during that period?

Answer. Yes sir.

Int. 32. What was the purpose of the reconstruction?

Answer. At that time the purpose was to unify the system and connect them up.

Int. 33. And was the system by that process unified and connected up?

Answer. Yes, sir. For example, the Sevastopol line ended at the north end of Coon river bridge, First Street, and the new line was constructed to connect it up with the center of the system and bring their cars and passengers to the center of the city.

Int. 34. I wish you would indicate the other connections for the same purpose.

Answer. There was a new line laid on Walnut Street, from Seventh to Twelfth, thence north on Twelfth to Grand Avenue; that was for the purpose of connecting up the lines in the northwest

2494 and west part of the city. Then there was a new line laid at the end of the Eleventh and Twelfth Street line, being an extension along either West Twelfth or Thirteen Street—goes by both names, or did—north to Clark Street connecting up that system. There was also a line connecting Sixth Avenue and West Ninth, and at that time it went down through what was known as "Devil's Gap" and the west bank of the Des Moines river to give West Des Moines passengers facilities for getting to what was known as the Zoölogical Garden and Crocker Woods. The line on East Second Street was constructed to give the Company access to their new power plant that was constructed. The line on East Sixth and Lyon Streets was for the purpose of connecting up the East Ninth Street line with the central system. The line on East Fourteenth and East Sixteenth and on East Walnut from Fourteenth to the Chicago & Great Western tracks was for the purpose of connecting up that branch of the system.

Int. 35. There are some extensions indicated, Mr. Hippee, that you have not spoken of.

Answer. Well, West Fourth and Fifth, there was an extension of three blocks made on West Fifth and Sixth Streets for the purpose of forming a loop in which all cars would pass around going to and from their respective destinations.

Int. 36. What did the Company have in the way of a power plant?

Answer. At this period, in 1889?

Int. 37. Prior to September 5, 1889?

Answer. They had a small power plant, located on West Second and Locust Street-, on leased ground.

Int. 38. What machinery did the Company have?

Answer. In that building was one engine, two small gener-
2495 ators and two boilers—I thing there were three small boilers.

Int. 39. What was done with reference to the power supply after the consolidation?

Answer. After the consolidation we purchased another engine, two more generators and two more boilers and installed them at first in this same locality.

Int. 40. Did you do that immediately?

Answer. Immediately, yes. In other words, we placed the contract immediately.

Int. 41. What did you do with reference to a permanent power plant?

Answer. We purchased property in East Des Moines, what is known as Lost, One, Two and Three of Griffiths Outlots. This included probably five acres, more or less, and in 1890 we began the erection of a building to be used as a power plant, and bought new engines, new boilers, new generators and installed them in this plant; and then after we had these new units installed we removed the old engines the generators and the boilers from the building at West Second and Locust to this new power plant. This new power plant was originally acquired and built by the Des Moines Sub Urban Railway Company which was then operated in connection with the Des Moines Street Railroad Company. That Company is now owned by the Des Moines City Railway Company and is the property where the present power plant of the Des Moines City Railway Company is now located.

Int. 42. Mr. Hippee, you have referred to the lines of the Narrow Gauge Company where the gauge was broadened; in doing this work, what use, if any was made of the old material in reconstruction?

Answer. There was none whatever. The rails were too
2496 light, ties were too short; the gauge was broadened from three feet to four feet, eight and one-half inches, and there practically was no use made whatever of any of the material.

Int. 43. During this period, Mr. Hippee, I understand all of the Narrow Gauge track was broadened?

Answer. Yes, and in reconstructing this and changing it we also had to relay all the pavement where the tracks were relaid.

Int. 44. How about the Broad Gauge tracks, reconstruction of them?

Answer. The Broad Gauge tracks were about like the Narrow Gauge, except that they were four feet eight and a half inches. It was necessary to reconstruct them all, because the construction of the Broad Gauge tracks was insufficient, so that the old tracks could not be economically operated, nor could they be operated with comfort to passengers. Most of these tracks were laid with what we call flat or strap rails. This was a flat rail with a flange, the rail being about an inch and a half to two inches thick at its thickest part. It was bolted to long pine stringers running under the rail and in the direction of the length of the rail. Sometimes ties at wide intervals were placed under these stringers and sometimes the stringers were laid on the ground and no ties were used at all. They were held together by tie-rods.

Int. 45. Any T rails?

Answer. There were some light T rails used, so light they were not fit for electric railroading and were taken up.

Int. 46. The Broad Gauge construction, general- speaking, was inadequate then?

Answer. Yes, sir.

Int. 47. Mr. Hippee, what was done with reference to new equipment?

2497 Answer. New equipment and new cars were purchased for the entire system and all of the old equipment was abandoned as rapidly as new equipment could be substituted for it. Of course it was necessary to abandon all the Narrow Gauge equipment at once. Some of the old Broad Gauge equipment was used for several years afterwards—not for several, probably two or three years.

Int. 48. In a general way, how much of the track, equipment and power plant of the Sevastopol Company, the Electric Company, and the Narrow Gauge Company used prior to September 5, 1889, was used thereafter?

Objected to on part of Respondent as being immaterial.

Answer. Practically none of it was used for reconstruction. It was of substantially no value and practically all of it had to be abandoned, with the exception of the engine, generators and boilers in the power plant which were used afterwards in connection with other machinery.

Int. 49. I now call your attention to map #3, which has been identified as "Exhibit D," entitled "Des Moines City Railway Company from July 1, 1893, to January 1, 1898, and ask you when, or about when the Des Moines City Railway Company took over this property and began to operate the Street Railway system?

Answer. On or about the 25th day of July, 1893.

Int. 50. Does the map #3, which has been identified as "Exhibit D" show the changes in the tracks from the time the Des Moines City Railway Company took over the property in 1893 up to the first of January, 1898?

2498 Answer. Yes, sir; it does.

Int. 51. Where new lines have been built, how are they designated?

Answer. By the black ladder line.

Int. 52. Where tracks have been removed, how are they designated?

Answer. By a light green line in connection with the lines that originally showed the track.

Int. 53. Where old lines were rebuilt, how are they shown?

Answer. In plain black lines.

Int. 54. Does the map #3, marked "Exhibit D," correctly show the matters you have just spoken with reference to?

Answer. Yes, sir.

Int. 55. The lines where rebuilt and removed are shown thereby?

Answer. Yes, sir, as shown on this map.

Int. 56. Does the map, Mr. Hippee, correctly show the matters it purports to show as indicated by the key?

Answer. Yes, sir.

Int. 57. I now call your attention to the map marked #4, entitled "Des Moines City Railway Company Map, showing both single and double tracks from January 1, 1898, to December 31, 1905," and marked "Exhibit E," and will ask you to state how the old tracks are designated on this map?

Answer. By red lines, as indicated by the key on the map.

Int. 58. By old tracks, what is meant?

Answer. That means tracks that were in existence on January 1, 1898, and have not been removed on December 31, 1905. In other words, it is the old track that was built at that period and no change has been made in it since.

Int. 59. Where single tracks have been re-laid during the period from January 1, 1898, to December 31, 1905, how are they indicated on the map?

2499 Answer. By plain black lines.

Int. 60. Where double track has been re-laid, how is that indicated?

Answer. By a red line between two black lines, as indicated in the key to the map.

Int. 61. Where one track has been re-laid and a new track laid beside it so as to make a double track, how is this indicated?

Answer. By a red line with a plain black line on one side and a ladder black line on the other side of it.

Int. 62. How are new tracks and extensions designated on this map?

Answer. By the ladder line.

Int. 63. Ladder black line is it?

Answer. Yes.

Int. 64. In case where double tracks existed and one of them had been re-laid, how is this designated?

Answer. By a red and black line, as indicated in the key to the map.

Int. 65. What does a double ladder line mean on the map, what does it indicate?

Answer. A ladder line means a new track, and a double ladder line means two new tracks, or a double track.

Int. 66. Now, Mr. Hippee, were the single tracks as indicated by the map re-laid, and were the double tracks re-laid as indicated, and one track re-laid and one new track constructed, and the new tracks or extensions constructed, and one track of double tracks re-laid as indicated on the map by the markings thereon, as shown by the key, during that period?

Answer. Yes, sir; this map correctly represents the changes and the tracks as indicated in the key, that have been re-laid, and new tracks put down, in that period, from January 1, 1898, to
2500 December 31, 1905.

Int. 67. Will you state in feet the length of the system of railway tracks on January 1, 1898?

Answer. 202,840 feet, or 38.71 miles.

Int. 68. Mr. Hippee, have you figured up the proportion of this track which existed on January 1, 1898, which has been rebuilt since that time and prior to December 31, 1905?

Answer. Yes, sir.

Int. 69. How much of the track that had existed January 1, 1898, was rebuilt prior to December 31, 1905?

Answer. 135,849 feet, or 25.925 miles.

Int. 70. How much new track was laid after January 1, 1898, and prior to December 31, 1905, in feet. I mean extension of tracks.

Answer. There was 199,478 feet, or 37.78 miles. So that of the present track only 65,991 feet, or 12.78 miles was laid on the first of January, 1898. The balance of the track, to-wit, 63.71 miles was either re-laid or new track laid since that date.

Int. 71. How much of the track of the Company in the City of Des Moines is upon private right of way, owned by the Company?

Answer. 131,891 feet, or 24.96 miles.

Int. 72. Where is that track located, can you tell?

Answer. Yes.

Int. 73. Where?

Answer. That track is located on Ingersoll Avenue, a portion of the way to the Army post, on the Belt Line, on the Urbandale line, and on a portion of the road to Grand View Park.

Int. 74. What do you call the Urbandale line?

2501 Answer. This is the line that crosses the Des Moines river on what we designate as the Des Moines River bridge No. 2. It is the bridge situated a short distance south of the Flint Brick Works.

Int. 75. When was that constructed?

Answer. In 1904 and 1905.

Int. 76. When was the Army Post line constructed?

Answer. 1902, I think. 1901 or 1902.

Int. 77. Are there any more lines of recent construction, recent extensions aside from these two?

Answer. No, sir; except the line to Grand View Park; that was newly constructed in 1901 and 1902.

Int. 78. Was the East — & Ninth street line extended?

Answer. Oh, I thought you were asking me about lines on private right of way.

Int. 79. You may answer it that way, or tell us, Mr. Hippee, what recent constructions there were irrespective of private right of way on other streets?

Answer. I do not know as I can remember that, Mr. Read.

(Question withdrawn.)

Int. 80. I now call your attention, Mr. Hippee, to the plat #5, entitled "December 31, 1905. Map of Des Moines City Railway Company, single and double tracks," which has been identified as "Exhibit F," and ask you whether this map shows in blue the single track of the lines of the Company that existed December 31, 1905, and in red the double track lines?

Answer. It does.

Int. 81. Correctly shows them?

Answer. Yes, sir.

2502 Int. 82. Are these tracks as thus shown all operated by electricity as the motive power, supplied by overhead construction, and have the tracks been so operated since the electrical equipment was installed, after the consolidation of 1889?

Answer. Yes.

Int. 83. In a general way, what system is adopted for the operation of the cars—I refer to the central station plan, etcetera, state fully.

Answer. There is a central station or waiting room at the corner of West Sixth and Mulberry Streets. The cars are run upon lines which diverge from the center of the City. At this point each car runs from the waiting room, or central station, to the end of its particular line and back in successive trips; transfers are granted between all lines which do not parallel each other, and passengers may transfer from one line to another at the waiting room or elsewhere, if it is more convenient to do so. The waiting room is within a block of the business center of the city. The fare charged is five cents, six tickets being sold for a quarter.

Objected to on part of Respondent as not being responsive.

Int. 84. How about connections with Inter-urban lines?

Answer. Passenger cars of the Inter-urban lines connect with the lines of the Des Moines City Railway Company running to Fort Des Moines, to Valley Junction and to Colfax. These lines are indicated in a part of the map in question. Passenger cars coming in on these Inter-urban lines run around the central loop of the Des Moines City Railway Company and then go out again.

2503 Int. 85. Have you stated where the central loop is?

Answer. Yes.

Int. 86. And the waiting room?

Answer. Yes, at West Sixth and Mulberry.

Int. 87. The loop passes by the Union Station?

Answer. Yes, sir.

Int. 88. How many lines of railway use the Union Station?

Objected to on part of Respondent as being immaterial.

Answer. Six or seven, I think.

Int. 89. Referring your attention to map # 1, which is desig-

nated as a map of Des Moines, showing all street railroads built up to 1889, which has been marked "Exhibit B," I will ask you to state if you are familiar with that map?

Answer. I am familiar with the map.

Int. 90. Does that map correctly show the street railway system tracks indicated by the key?

Answer. It does; as the street railway tracks existed at that time.

Int. 91. Does it correctly show the boundaries of the old corporation and the outlying incorporated cities and towns embraced within the limits of the extended corporation of the city of Des Moines?

Answer. It does, as I know them.

Int. 92. Speaking generally with respect to the maps exhibits "B" "C" "D" "E" and "F," do they correctly portray and represent the situation with respect to the street railway tracks as indicated thereon, and as shown by the respective indices thereto?

Answer. They do.

Int. 93. Do the respective maps, Mr. Hippee, correctly show where the various tracks are located as to streets and alleys as
2504 they were at the various times which the maps purport to show?

Answer. Yes, sir; each map shows correctly what it purports to represent as indicated by the key.

Int. 94. I mean to inquire, are the tracks on the streets and alleys represented by these maps?

Answer. They are.

Int. 95. Do you know whether the map which has been identified as Exhibit "A" is accepted and regarded and used as a map of the city of Des Moines, circulated and used as such?

Answer. Yes, sir; it is.

Int. 96. Have you examined that map so as to be able to state whether or not the tracks of the railroad as shown thereby, with the exception of the proposed extension of the East Sixth & Ninth street, is correct?

Answer. Yes, sir, they are correct, with the exception of the proposed extension of the East Sixth & Ninth Street.

Int. 97. You may state, Mr. Hippee, to what extent the map "Exhibit A" is in general use in the city of Des Moines, or whether there is any other map in use.

Answer. No other map in use that I know of; that is the only map I know of that has been used.

Int. 98. How long has that map been in use?

Answer. This present map has been in use since 1902. Prior to that there was another Commercial Exchange map in use.

Int. 99. You understand this is a revision of the former map?

Answer. I understand this is a revision of the Brown map, and that this is the Tate map.

Complainant now offers in evidence Exhibits "A" "B" "C" "D" "E" and "F."

2505 Objected to on part of Respondent as being immaterial and incompetent.

Int. 100. Mr. Hippee, in the testimony reference has been made to a resolution of the City Council of the city of Des Moines, Passed in 1886, granting to the Des Moines Broad Gauge Street Railroad Company rights on East Sycamore Street between East Twelfth Street and the corporation limits. State whether or not the track built under this resolution was the yellow track extended to the Fair Grounds on Grand Avenue or Sycamore Street, shown on the map #2, and marked "Exhibit C," and a part of which was afterwards torn up?

Answer. Yes, sir.

Int. 101. A resolution of the city of Des Moines has been offered in evidence, dated February 6, 1890, relating to the extension of the Sevastopol line. What was done under this resolution?

Objected to on part of Respondent as being immaterial.

Answer. Under this resolution that line was connected up with the system so that the cars could be brought to the central station and operated as part of the system.

Int. 102. That is shown by the map?

Answer. Clearly shown by the map #2; shows the connection made.

Int. 103. You have heretofore spoken of that also?

Answer. Yes.

Int. 104. A resolution of February 28, 1890, has been offered in evidence, providing for widening the tracks on East Ninth Street and maintaining them on the west side of the street until
2506 the street was sewered and paved. What was done with reference to this resolution?

Objected to on part of Respondent as being immaterial.

Answer. Under that resolution the track was laid as provided, on the west side of the street and the street was afterwards paved, and the track was then placed in the center of the street.

Int. 105. I call your attention to the resolution of July 17, 1893, providing for the extension of tracks along Mulberry Street, from Sixth to Seventh Street, and thence north on Seventh Street. State whether these tracks were built?

Objected to on part of Respondent as being immaterial.

Answer. They were.

Int. 106. What was the use to be made of these tracks?

Answer. The central station of the Company is now located at the corner of Sixth and Mulberry Streets, and these tracks were to be used as part of the loops of the Company around which the cars go in passing the central station, and was intended to accommodate Ingersol Avenue, Eleventh & Twelfth and Center Street lines, which constitute an important part of the system, and also the Inter-urban service to Valley Junction uses this piece of track.

Int. 107. A resolution has been offered in evidence, dated July 24, 1893, authorizing the rearrangement of the tracks on Walnut Street. For what purpose were these tracks rearranged?

Answer. They were rearranged in order to accommodate
2507 them to the *the* rearrangement of the Company's loop used in bringing the cars to the waiting room or central station, which has already been referred to. These tracks are used by several of the most important lines of the city. The loop was rearranged so as to better the service and provide for increased traffic, etc.

Int. 108. Mr. Hippee, what issues of bonds have there been since September 5, 1889, by this Company?

Objected to on part of Respondent as being immaterial.

Answer. In connection with the reorganization in September, 1889, there was an issue of six hundred thousand dollars of bonds, dated October 1, 1889, executed by the Des Moines Street Railroad Company and secured by a trust deed to the American Trust & Savings Bank, Trustee.

Int. 109. Was there any other issue, and if so, what was the next one?

Answer. The next issue was by the Suburban Company, an issue of three hundred thousand dollars in bonds, dated 11th day of August, 1891, and secured by a trust deed to the Iowa Loan & Trust Company, of Des Moines, Iowa, Trustee.

At this time, 12 o'clock M., an adjournment was taken until 2 15 o'clock P. M.

Now, at 2 15 o'clock P. M. April 13, 1906, the further taking of testimony herein, was resumed, as follows:

Mr. G. B. Hippee, recalled on part of Complainants for
2508 further direct-examination. Examined by W. L. Reed, Esq., and testified as follows:

Int. 110. Mr. Hippee, is the paper marked Exhibit 225, a copy of the Trust Deed to the Iowa Loan & Trust Company?

Answer. That is a copy of the Trust Deed of the Des Moines Suburban Company to the Iowa Loan and Trust Company.

Int. 111. Where is the original?

Answer. With the Iowa Loan & Trust Company.

Int. 112. Are the bonds still outstanding?

Answer. Yes, sir.

Complainant offers in evidence Exhibit 225.

Objected to on the part of Respondent as being incompetent and immaterial.

Int. 113. What is the next Trust Deed and Bond Issue?

Answer. A Trust Deed given by the Des Moines City Railway Company, dated May 1st, 1893, to the Illinois Trust & Savings Bank as Trustee.

Int. 114. Given to secure a bond issue of how much?

Answer. Of $305,000.00.

Int. 115. That was the bond issue under that Trust Deed, $305,000?

Answer. Yes, sir.

Int. 116. What was the next bond issue?

Answer. The Des Moines City Railway Company issued its refunding mortgage 5 per cent. gold bonds, dated April 1, 1901, and secured by a Trust Deed to the Illinois Trust & Savings Bank, and William H. Henkle, as Trustee.

Int. 117. State to what extent the proceeds of the bonds referred to have been used in renewals, additions and extensions to the
2509 tracks, power plant, car barns, shops, machinery and equipment of the property now owned by the Des Moines City Railway Company and necessary for the operation of the road?

Objected to on the part of respondent as being immaterial.

Answer. The amount of the first bond issue so used was $150,000. The $300,000 of the bonds of the Suburban Company were spent in acquiring the Belt Line, the River Line, and the Rapid Transit Line, and in additions and equipments for the property, the power plant, principally in connection with the power plant. Of the Bonds of the Des Moines City Railway Company, dated May 1, 1895, $305,000 were issued, all of which was used for the purpose indicated in your question. The last bond issue of the Des Moines City Railway Company, dated April 1, 1901, the proceeds of $1,715,000 have been used for the purpose indicated by your question; and the balance has been used to take up prior issues of bonds.

Int. 118. State the aggregate amount of bonds now outstanding under each of the Trust Deeds that have been referred to, not including bonds that are held in escrow to provide for bonds issued under earlier trust deeds, but including only the actual present bonded debt of the Company?

Answer. Under the Street Railroad Trust Deed of October 1, 1889, there are $300,000 outstanding. Under the Suburban Trust Deed there are $250,000; under the first Des Moines City Railway Trust Deed, there are $4,000 outstanding; under the last Des Moines City Railway Company Trust Deed there are $2,270,000 outstanding.

Making a total of $2,824,000, and of this issue of the last Des
2510 Moines City Railway Company 5 per cent. bonds, there are bonds in escrow to retire these 6 per cent. bonds. In other words, the 6 per cent. bonds are the $300,000 that are outstanding under the trust deed of October 1, 1889; and the $250,000 outstanding under the Suburban Trust deed, and the $4,000 that are outstanding under the first Des Moines City Railroad Trust Deed, they are held in escrow under the last Trust deed of the Des Moines City Railway Company bonds, to retire those bonds.

Int. 119. They are not included in this estimate?

Answer. No, sir, I am giving the total bonded indebtedness.

Int. 120. Since the organization of the Company, in 1889, I mean of the Des Moines City Railway Company, what amount has been paid, if anything, in dividends?

Objected to on the part of respondent as being immaterial.

Answer. No dividends have been declared or paid by any of the Companies since the consolidation in 1889?

Int. 121. By any of the Companies, you refer to what?

Answer. I refer to any companies organized since 1889,—the Des Moines Street Railroad Company, or the Des Moines Suburban or the Des Moines City Railway Company, which are the companies which have become merged in the Des Moines City Railway Company.

Int. 122. What use has been made of the net earnings of the Company and what has been approximately the aggregate amount of them during the period since 1889, and up to January 1, 1905?

Answer. The aggregate amount has been about $525,886.00, and they have all been used in helping to pay for extensions, new equipment, new machinery and generally for the betterments and
2511 improvements of the properties of the Company.

Complainant here offers in evidence *form* the Revised Ordinances of the City of Des Moines, of 1889, as printed under authority of the City of Des Moines, beginning on page 552 thereof, passed July 23, 1889, entitled, An Ordinance Requiring Street Railway Companies to Pave and Maintain Two and One-Half Feet in Width Each Way, Commencing at the Center of the Space Between the Rails, and Providing for the Manner of Assessing Against such Companies the Cost thereof, and to Repeal *and* Ordinance Entitled "An Ordinance Requiring Street Railway Companies to Pave and Maintain Three and One-Half Feet Each Way, commencing at the Center of the Space Between the Rails, and providing for the Manner of Assessing Against such Companies the Cost Thereof." Passed July 5, 1889, as follows:

SECTION 1. Be it Ordained by the City Council of the City of Des Moines: Whenever the City Council shall hereafter order any street or part of street paved or macadamized, or when the same shall have heretofore been ordered and the work not done at the time of the passage of this ordinance, upon any street or part of street upon which a street railway company is located, it shall be the duty of such company to pave and maintain two and one-half feet in width each way, commencing at the center of the space between the rails, and such paving shall be done in the manner, at the time and shall be of the material required of the owners of the property abutting upon the street or part of street ordered paved.

SEC. 2. After the ordering of the paving of any street or part of street the Council shall cause to be served upon the Street
2512 railway company or companies occupying any street, or part of street, a copy of a resolution ordering said improvement to be made by said company, and upon the service of said resolution such company shall, by its proper officer within ten (10) days, notify the City Clerk in writing of its intention to perform said work and in case such company shall neglect or refuse to file said notice within the time and manner as herein directed, such failure shall be deemed, and is hereby declared, a refusal to do said work and thereupon the City Council shall direct the work to be done and assess the expense thereof against all the property, rights and franchises of such company in the manner provided herein.

SEC. 3. If upon the Company being notified to pave as directed in Section 2 hereof and such company should file the notice as directed in said section, stating that such company would perform the work

and then afterwards should fail to perform the same at the time and in the manner as provided for the paving of the main portion or portions of said street, thereupon the City Council shall order the work done and assess the cost of said paving as provided herein.

SEC. 4. If any street railway company shall fail to pave the space at the time and in the manner required by this ordinance the Board of Public Works and the City Engineer shall constitute the Board of Assessors and shall assess the cost of said paving to such company and report the same to the City Council and when said assessment is confirmed by the Council it shall be final and complete; provided, that the Council shall give such company ten (10) days' notice of the time and place when and where said assessment is to be confirmed and such company shall have the right to appear and file written objections thereto.

SEC. 5. When said assessment shall be made and confirmed by the Council, the City Clerk shall certify the same to the City
2513 Treasurer, which shall be placed upon the Books of his Office, and such charge, when assessed, shall be payable by such street railway company at the time of such certification and the same shall be and remain a lien upon all the property, rights and franchises of said company from the time of said assessment until fully paid and shall have precedence over all other liens, excepting ordinary taxes, and shall not be divested by any judicial sale and such charges may be collected and such lien enforced by the contractor, or by any person to whom he shall direct payment to be made by a proceeding in law or equity and the contractor or person to whom payment shall have been directed to be made shall be entitled upon the neglect or refusal of such company to pay the same, to claim and recover in addition to the amount of assessment interest thereon at the rate of ten per cent. from the time of the assessment and five per cent. to defray the expenses of collection which shall be included in any judgment or decree which may be rendered against said company for the cost of such improvement. Provided, that if any such street railway company shall desire to pay for said paving in installments, certificates shall be ordered issued by the Council against all the property, rights and franchises of said company. Provided, further, that such company shall promise and agree in writing, endorsed on such certificate, that in consideration of having the right to pay such assessment in seven equal installments said company will not make any objections of illegality or irregularity to such assessment and will pay the same with interest thereon at six per cent., together with the same penalties as required for the non-payment of ordinary taxes, and such certificate when issued shall be certified to the County Auditor and be a lien as provided herein upon the property rights and franchises of said company and collected in the same manner and with the same penalties as provided by chapter
2514 one hundred and sixty-eight, laws of Iowa and acts amendatory thereto.

SEC. 6. Whenever it shall become necessary to repair any of the paved streets upon which any street railway is situated, the City Council shall serve notice upon said company to repair two and one-half feet in width each way, commencing at the center

of the space between the rails and said notice shall specify the time within which such repairs shall be made, and if said company shall neglect or refuse to do said work as directed, the same shall be done by the City and the expense thereof shall be assessed against all the property, rights and franchises of said company, as provided herein, and the party performing said work, or his assigns, shall have and be entitled to recover the cost thereof as provided by this ordinance.

SEC. 7. An Ordinance entitled "An Ordinance requiring street railway companies to pave and maintain three and one-half feet in width each way, commencing at the center of the space between the rails, and providing the manner of assessing against such companies the cost thereof," passed July 5, 1889, be and the same is hereby repealed.

SEC. 8. All ordinances or parts of ordinances in conflict herewith are hereby repealed."

Objected to on the part of respondent as being immaterial and incompetent.

Counsel for respondents however admit the book from which the ordinance is offered is what it purports to be, being the Revised Ordinances of the City of Des Moines for the year 1889, as published by authority of the City.

2545 Complainant offers in evidence from the printed proceedings of the City Council of the City of Des Moines, for the year 1889, the following acceptance of the foregoing ordinance, as the same appears on page 108 of such proceedings:

"To the City of Des Moines:

The undersigned street railway companies hereby accept the ordinance passed by the Council of said City on the 23rd day of July, 1889, requiring street railway companies to pave two and one-half feet in width from the center of each track, etc., and each of said undersigned companies accept said ordinance according to each and every provision thereof, and they agree to pave or pay for the paving as therein provided, waiving all irregularities and omissions, if any, and objections as to the award of paving contracts prior to the passage of the aforesaid ordinance.

Dated and signed this 24th day of July, A. D. 1889.

DES MOINES ELECTRIC RAILWAY COMPANY,
By R. N. BAYLIES, *President*.
DES MOINES STREET R. R. COM.,
By F. A. SHERMAN, *Secretary*.
DES MOINES RAPID TRANSIT COMPANY,
By C. H. CATCH, *President*.
DES MOINES BELT LINE RAILWAY COMPANY,
By E. T. LIKES, *President*.
DES MOINES RIVER LINE RAILWAY COMPANY,
By E. T. LIKES, *President*."

2516 Int. 123. Mr. Hippee please state in a general way what the situation was in reference to the ordinance of July 23, 1889, when this ordinance of July 23, 1889 was accepted.

Answer. Each road was required at that time by its franchise to pave between the rails. This left the Narrow Gauge to pave three feet, the Broad Gauge Company four feet eight and one-half inches. The Legislature had passed a law in 1888, authorizing cities to fix the amount of paving to be done by street railroads not in excess of seven feet. The City shortly after that act was passed by the legislature passed a seven foot ordinance, which the companies had refused to accept. The city had ordered paving on various streets, and about which controversies had arisen, the companies claiming they were not bound to pay for seven feet. As a matter of compromise this ordinance of July 23, 1889, was passed and accepted, fixing five feet as the amount of paving that all the companies should pay.

Int. 124. What is the fact, Mr. Hippee, as to whether in the interval from the passage of this ordinance up to the 1st of January, 1898, the street railroad was assessed for paving under this ordinance, and paid these assessments?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. It was so assessed and paid the assessments.

Int. 125. What amount did it so pay, in the aggregate?

Answer. Approximately, $120,000.

Int. 126. You are referring to the amount paid by the Des Moines Street Railroad Company and its successor, the City Railway Company?

Answer. Yes, sir, up to that period.

2517 Int. 127. What assessments for paving have been made against the Des Moines City Railway Company since January 1, 1898?

Objected to as being immaterial.

Answer. On March 6, 1899, there was assessed against the Company for paving on Cottage Grove Avenue, from Nineteenth to Twenty-eighth Street $5198.41, but later this assessment was set aside upon the ground that the Company had not been afforded an opportunity to do the work. The controversy arose in the first instance because the City attempted to assess more paving than the Company thought it was liable for. Then there was assessed against the Company on Ninth Street from Forest Avenue to Crocker Park, March 31, 1899, $1577.75.

On July 3, 1903, there was an assessment for paving against the Company on Lyon Street, from East Sixth to East Ninth Street, amounting to $3278.21.

There was an assessment for paving against the Company on November 2, 1903 for paving on East Second Street, from Locust to Grand Avenue, amounting to $73.40.

On February 15, 1904, there was an assessment made against the Company for paving on East Twelfth Street, from Grand Avenue

to Walker Street; the total paving on that street though ran from Grand Avenue to Washington Street, but the assessment against the Street Railway Company was from Grand Avenue to Walker Street and amounted to $2581.32.

On March 21, 1904, there was an assessment for paving against the Company on East Walnut Street. This work on East Walnut Street began at East Eleventh Street and extended to East Eighteenth, but the assessment against the Company was for paving from East Fourteenth Street to East Eighteenth Street and amounted to $7301.

2518 On December 30, 1904, there was an assessment for paving against the Company on West Thirteenth Street. This work extended from University Avenue to North Washington Street; the assessment against the Company was from University Avenue to Clark Street and amounted to $3022.

On February 20, 1905, there was an assessment against the Company for paving on West Twelfth Street, from School to University Avenue; this paving amounted to $1058.

On November 21, 1905, there was assessed for paving against the City Railway Company on account of paving done on West Walnut Street, from West Second Street to West Ninth Street, amounting to $5923.62.

On January 2, 1906, there was an assessment against the Company for paving West Scott Street from Ninth to Tenth, and on Tenth Street from Scott Street to Center Street, amounting to $1040.39.

Int. 128. Was this all original construction, or are any repairs included in these items?

Answer. This was all new paving.

Int. 129. Was there during that period repairs made?

Answer. Repairs to the paving?

Int. 130. Yes, sir?

Answer. O, yes, but not on these streets.

Int. 131. No repairs are included?

Answer. No, sir; this is all new work.

Int. 132. The repairs were made upon other streets not included in this estimate?

Answer. Yes, sir.

Int. 133. They cost a considerable amount?

Answer. O, yes, we have spent a good deal of money repairing pavement and relaying pavement in the last few years.

2519 Int. 134. What was the character of the paving on account of which the assessments which you have enumerated were paid, the method of construction, as to whether it was permanent or otherwise?

Objected to on the part of respondent as being immaterial.

Answer. It was either brick or asphalt paving, and all the asphalt, and all the brick was upon concrete foundation, all this paving I have enumerated.

Int. 135. What was done by the Company in the way of re-constructing and re-laying tracks where this pavement was laid?

Objected to on the part of respondent as being immaterial.

Answer. In each instance the tracks were re-laid and ties were imbedded in concrete, and the greater part of the material that went into the tracks that was laid in this paving was new, including new ties, new rails, new special work, and items going to make up a new track.

Int. 136. When was this pavement laid on West Walnut Street, from Second to Ninth Street for which the assessment was made November 21, 1905?

Answer. That was laid in July or August, 1905.

Int. 137. What about the track construction and re-laying?

Answer. On this paving the rails from 5th Street to 9th Street were not replaced. From Second to Fifth Street new rails and new ties were put in; but on the piece of work from Fifth to Ninth, that had been in a couple of years, and there were practically new rails. The ties were imbedded in concrete, that was gone over
2520 and inspected thoroughly as to its joints, etc., to see it was in first class condition; but the special work I refer to, work that is put in at the intersections of streets, such as West Second Street, West Fourth Street, Fifth Street, Sixth Street and Seventh Street, which means crossings and curves, and there are a great many of these in the streets I have mentioned, was all new work and was of the most improved construction possible to put in at that time that we knew anything about, and it was put in on specifications and plans prepared by the City Engineer, put in on a very heavy foundation, and part of it on broken stone, tamped, and part of it on Portland Cement, concrete.

Int. 138. I believe you stated new track was laid from Fifth to Second Streets.

Answer. New track was laid from Fifth to Second, yes, sir.

Int. 139. What knowledge had the City with reference to the work that was being done in relation to these tracks and paved streets?

Answer. The City knew this work was being done and prepared the specifications for it, and had an inspector over the work.

Int. 140. Then it was done under the direction and supervision of the City?

Answer. Yes, sir.

Int. 141. Have you any written orders from the City requiring the railroad Company to do paving?

Answer. Yes, sir, we had written orders on this Walnut Street job and we had on several of them.

Int. 142. Have you then any written orders requiring the Street Railway Company as a condition precedent to the assessment of the cost of it, where you wished — lay tracks on streets that had been paved?

2521 Answer. These orders are obtained first by going to the Board of Public Works and the City Engineer, and on the written request from the Street Railway Company, they determine the value of the paving and then submit that estimate to the City Council and the City Council by resolution approves that report.

and authorizes us when the same is paid in to go on the street and do the work.

Int. 143. That was done in every instance?

Answer. Yes, sir.

Int. 144. Will you produce such written orders as you have, Mr. Hippee?

Answer. I will.

Int. 145. You have referred to a controversy growing out of the paving on Cottage Grove Avenue, and have made the statement that the assessment was set aside because the Street Railway Company had not been given an opportunity to make the improvement itself before it was done by the contractor and assessed, do you recall that statement?

Answer. Yes, sir.

Int. 146. I will ask you Mr. Hippee, is Exhibit 226 a notice or copy of the notice served upon the plaintiff by the City with respect to the paving designated and described therein?

Answer. Yes, sir.

Complainant offers in evidence Exhibit No. 226.

Int. 147. Were the other notices similar to this except with respect to being on different streets or of different material?

Answer. Practically; I understand they were the same, yes, sir.

Int. 148. With respect to the assessments that you have enumerated, you may state whether such assessments were made by the City Council of the City of Des Moines?

2522 Answer. Yes, sir; such assessments were made against the property of the Des Moines City Railway Company.

Int. 149. Where you have enumerated particular streets, it was for the improvement of those particular streets?

Answer. For the improvement of those particular streets, yes, sir.

It is admitted by the defendant, the City of Des Moines, that notices similar to the notice, Exhibit 226 were served upon the complainant with respect to the pavement on each of the streets enumerated by the witness G. B. Hippee, prior to the construction of the improvement.

Int. 150. Mr. Hippee, what is the fact, as to whether the City of Des Moines has each year since the year 1898 assessed and listed the property of the complainant company under the general taxing laws for state, county, municipal, school and special purposes?

Answer. It has.

Int. 151. When was the last action of this kind had by the City Council relative to the assessment of the property?

Answer. April 3, 1906.

The Complainant here offers in evidence ordinance No. 1063 of the City of Des Moines, passed December 30, 1899, and the same being sections 791, 792, 793 and 794 of the revised ordinances of the City of Des Moines for the year 1900, printed by authority of the City, as follows:

"SEC. 791. *Must pay for Pavement Before Extending Tracks.*—

SECTION 1. That before any street railway company shall lay its track upon any street which has been paved, and is not at the time being repaved, it shall pay into the City Treasury the
2523 value of all paving between the rails of its tracks proposed to be laid and one foot outside each rail thereof, and before laying any additional switch track, turnout or other additional track on any such street already occupied, it shall pay into the City Treasury the value of the paving not already paid for by such company between the rails of its tracks proposed to be laid, and one foot outside each rail thereof.

SEC. 792. *Cost, How Ascertained.* SECTION 2. Whenever any street railway company, which is authorized so to do, shall desire to lay any new or additional track, as provided in section 1 of this ordinance, it shall file with the Board of Public Works a written notice, with a description of the track proposed to be laid and a plat of the part of the street on which it is to be laid. The Board of Public Works and City Engineer shall then prepare and file with the City Council, a plat of the street and a report and schedule stating the quality of pavement which under the provisions of this ordinance the street railway company is required to pay for, the kind of pavement, when laid, the condition thereof and its original cost, together with their estimate of the value of such payment. Upon receiving said plat, report and schedule, the City Council shall by resolution determine the value, not exceeding the original cost, of such paving to be paid by said street railway company, and when the amount so determined is paid to the City Treasurer, he shall give to such street railway company a receipt therefor, a duplicate of which must be filed with the City Auditor and Board of Public Works, and said receipt when countersigned by the Auditor and Board of Public Works, shall be a permit to remove the pavement for the purpose of laying said track.

SEC. 793. *Money, How Disposed of.* SECTION 3. The money paid in as aforesaid shall be credited to the City Improvement fund, and upon application therefor shall be refunded to the abut-
2524 ting property owners in proportion to the amounts originally assessed to their property. Such payments to be made pursuant to resolution passed by the Council ordering the same.

SEC. 794. *Repeal.* SECTION 4. All ordinances and parts of ordinances inconsistent with this ordinance are hereby repealed."

Int. 152. You may now please state how much track the Company since January 1st, 1898, has constructed upon streets that were paved before the construction of the track, and where it has paid for the pavement tax?

Answer. 26,923 3/10 feet.

Int. 153. You may state what tracks were so paved, giving the amounts paid out on account of the paving for the respective pieces of track construction, and the respective lengths of the different pieces of tracks that were laid?

Objected to on the part of Respondent as being immaterial.

Answer. On September 11, 1903, on West Grand Avenue there

was an assessment for two tracks, from 6th to East First, amounting to $1210.22 being 1211 feet

On September 15, 1903, on East Grand Avenue two tracks from East First to East Ninth, amounting to $2,277.88, being 6,200 feet.

On October 15, 1903, University Avenue, two tracks, from Seventeenth to Eighteenth, being 592 feet; and on University Avenue, being two tracks from 18th to 20th, 1,678 feet; and on Twentieth Street from University to St. Joe Street, being 5,846 feet; the total amount paid on this, $1,670.53.

On October 15, there was an assessment for two tracks on Seventeenth Street, from Grand Avenue to Park Street, and on
2525 Park Street from Seventh to Ninth, for one track, and on Ninth Street from Park to Center, one track; and on Center from Ninth to Tenth, one track; and on Seventeenth from Center to Crocker, one track. There was a total paid on this $1,325.76; the total distance 5,534 feet.

On August 15, 1904, there was assessment for one track on West Second, from the 1st alley south of Locust, south to Court Avenue, amounting to $347.05, the distance being 820 feet.

And on May 12, 1905, there was an additional payment made on account of West Seventh Street track enumerated above, $620.42.

On May 15, 1905, there was an assessment for one track on West Grand Avenue from Twelfth to Fourteenth, amounting to $368.28 being 550 6/10 feet.

In June 1905, there was an assessment for one track on University Avenue, from Twenty-fourth to Twenty-ninth, amounting to $983.67, being a distance of 1461 7/10 feet.

Int. 154. Where you say there was an assessment, you mean, Mr. Hippee, there was an assessment of the value of the improvement appropriated in laying the tracks?

Answer. I mean that the assessment is made by the resolution of the City Council against the Company; in other words, it is the amount of money the company has to pay in for the use of this paving before the track can be put down.

Int. 155. In other words, it is the appraisement of that portion of the pavement which the street car company appropriates in laying its tracks?

Answer. That is right; yes, sir.

2526 Int. 156. Were these amounts that you have enumerated paid?

Answer. Yes, sir.

Int. 157. To whom were they paid?

Answer. Some of them were paid direct to the City Treasurer, and a part of them were paid to the property holders and their receipts filed with the City Treasurer, showing payment was made.

Int. 158. By property holders, you mean owners of abutting property?

Answer. Yes, sir.

Int. 159. Now these amounts were, as you have stated, determined by appraisement of the City Council upon the application of the Street Railway Company?

Answer. Yes, sir; the application was made by the street railway company to the Board of Public Works and City Engineer. They determine the value and report to the City Council, and the City Council by resolution approved that report.

Int. 160. An ordinance has been introduced in evidence, passed by the City Council March 28, 1899, relative to putting fenders upon the cars. At the time this ordinance was passed state whether there were any other street railways in the City of Des Moines except the Des Moines City Railway Company. I mean operating street railway companies?

Answer. No, sir; there was no other except the Des Moines City Railway Company.

Int. 161. What negotiations were there prior to the passage of the fender ordinance referred to relative to the subject of fenders?

Answer. The Council took up the question requiring fenders to be placed on the cars and appointed a committee to confer with the Street Railway Company and to try and decide upon what
2527 was the best kind of fender to be put upon the cars. The Company sent off and got samples of various fenders at that time manufactured and on the market, and demonstrations were made before this committee, and the then mayor of the City, Mr. John McVicar and the committee finally recommended the fenders that have been described in the ordinance passed shortly after they witnessed the demonstration.

Int. 162. What was thereafter done with reference to equipping the cars of the plaintiff company with fenders in question?

Answer. Since the time that the ordinance was passed, all cars of this company have been equipped with fenders.

Int. 163. How much has been spent for that purpose by the Company?

Answer. I don't know exactly what has been spent; we have perhaps 125 cars that are equipped with fenders, and the fenders cost about $35 a piece, and then there was the labor of putting them on.

Int. 164. A resolution has been introduced, passed by the City Council June 6, 1898, relative to an extension of the company's tracks on West Ninth Street west on Jefferson Street, to connect with its tracks on West Thirteenth street; please state whether the tracks referred to in this resolution were constructed, if so, when?

Answer. Yes; this extension was constructed and built about July, 1898.

Int. 165. What was the length of this track?

Answer. It was about 1300 feet.

Int. 166. A resolution has been introduced in evidence, passed by the City Council of the City of Des Moines, November 3, 1898, relative to the construction of tracks south on East Twentieth Street to Maury Street, and thence east to Chesterfield; state whether
2528 or not this track was constructed, if so, when and the number of feet?

Answer. This track has been constructed and it is about 1,200 feet long; I think that track was constructed in 1899 or 1900. I am not sure, exactly; I think it was in 1899. This resolution was in the fall of the year; I think it was constructed the next summer.

Int. 167. A record of the proceedings of the City Council of the City of Des Moines, of July 2, 1900, has been offered in evidence, relative to a petition to the Council for the extension of East Sixth & Ninth Streets lines; you may state what was done, if anything, in response to this action?

Answer. This track that was petitioned for, the extension, was made in 1901.

Int. 168. How much track was constructed?

Answer. There was about 3,450 feet of it.

Int. 169. What, if any value, would there be in this track, this construction you have referred to, to operate independently and not as a part of the system furnishing facilities for transit to the business center of the City?

Objected to on the part of respondent as being immaterial.

Answer. These extensions on east Twentieth Street, east Ninth Street, or any other extension that was made out in the outlying districts of the City of Des Moines, as an independent proposition, they wouldn't be worth a thing but scrap.

Int. 170. Is that true with respect to all these outlying extensions?

Answer. It refers to all of them; you couldn't go anywheres or get anywheres on them.

Int. 171. Some resolutions have been offered in evidence,
2529 passed by the City Council relative to an extension of the Loop of the Street Railway Company around the south side of the Court House Square, including a resolution of August 1, 1900; you may state whether the change in the Loop which the ordinance or resolution contemplated was made, and if so, when?

Answer. Yes, sir; that change was made in 1900.

Int. 172. How much track was built in making that change?

Answer. About 875 feet.

Int. 173. How did this track come to be constructed, what was the occasion for it?

Answer. A great many of our patrons were patrons of the Union Station; they desired to have this done in order to have the cars pass the station, for their convenience, going to and coming from the trains, handling persons and baggage, and lengthening the loop of the company to a certain extent. It was a public convenience.

Int. 174. The Union Station, Mr. Hippee, is the Union Railway Station?

Answer. Yes, sir; south of the Court House.

Int. 175. What use was made of this track?

Answer. Why, as stated, it is a part of the Loop, and every car of the system passes over it, and to that extent it is a part of every line of railway in this City operated by the Des Moines City Railway Company; every line must come in and go out over the Loop.

Int. 176. Is there anything, Mr. Hippee, distinctive in the loop feature of the Company here in Des Moines?

Objected to on the part of respondent as being immaterial.

2530 Answer. Yes; at the time the loop was constructed here, it was, I believe, the only City—there might have been one

other—New Orleans perhaps, might have had one—the only City that had a central loop where the trains could go to the station from any part of the City; in other words, you can get on a car anywhere and land back on the loop.

Int. 177. Has that method since been adopted in some other cities?

Answer. It has, in some other cities; yes, sir.

Int. 178. That Loop, you have stated, Mr. Hippee, passes by or on the street in front of the Union Railway Station; I ask you how near it passes to the Chicago Rock Island & Pacific Railway Passenger Station?

Answer. A half block.

Int. 179. Where the Loop makes the turn from Fifth Street west on Cherry Street, it is but a half a block to the Chicago, Rock Island & Pacific Passenger Depot?

Answer. Yes, sir.

Int. 180. It is true, is it not, that all of the passenger trains going into the City of Des Moines, except the passenger trains of the Chicago Northwestern Railway, come into either the Union Station or the Rock Island Station?

Answer. Yes, sir.

Int. 181. A petition has been introduced in evidence requesting an extension of the tracks north on Twentieth Street, which has been marked "granted June 17, 1901;" the petition was presented to the City Council; state what if anything was done in response to this petition?

Answer. These tracks were constructed on Seventeenth and Twentieth streets, north from Center to St. Joe street, about 1220 feet.

2531 Int. 182. A resolution of the City Council, passed June 22, 1901, has been introduced in evidence referring to an extension on East Walker street and East on Boulevard; you may state whether or not that extension was made, if so, when?

Answer. Yes, sir; that extension was made in 1901.

Int. 183. How much track was constructed?

Answer. There was about 7,240 feet.

Int. 184. Do you recall that there was pending before the City Council in 1901 a communication from one, McKay, asking a franchise to be granted to him?

Answer. Yes, sir.

Int. 185. Was any franchise ever granted?

Objected to as the part of respondent as being immaterial.

Answer. No, sir.

Int. 186. On November 19, 1901, there was a petition for establishing a grade on Summit Street, looking to the construction of some track there; I assume that the petition was presented to the City Council; you may state, Mr. Hippee, what if anything, was done about that matter and about that track?

Answer. The petition was presented to the City Council and the track was built on this street.

Int. 187. What about the establishment of the grade?

Answer. The grade was established, and before we put the track

557

down they put this portion of the street to the grade as established by the City officials; this was in 1901.

Int. 188. How much track was constructed?

Answer. 1330 feet; somewhere about that.

Int. 189. An ordinance has been introduced in evidence, being ordinance 1155, entitled an Ordinance to straighten Seventeenth Street, between Grand Avenue and Ingersoll Avenue; what
2532 changes if any, were made in the tracks of the plaintiff Company, in order to conform to that ordinance?

Answer. These tracks were changed and rebuilt so as to conform to the new alignment of the street; the track changed and rebuilt was about 800 feet long and extended from Grand Avenue to Ingersoll Avenue.

Int. 190. A resolution of the City Council of the City of Des Moines has been introduced in evidence, passed April 20, 1903, relative to pavement on West Grand Avenue, between Fourteenth and Seventeenth Streets; what was done by the company in that connection?

Answer. At the time of the resolution the Company had a single track from Fourteenth to Seventeenth on West Grand Avenue; it took up this track and rebuilt it with a double track; the pavement was old, the original poor and in bad condition, consisting of two courses of inferior brick. Under the recommendations of the Board of Public Works and the City Engineer, referred to in the resolution, a space from a foot north of the north rail to a foot south of the south rail was repaved by the company, with brick, on a concrete foundation at the time the track was laid, the Company paying the expense of such repaving.

Int. 191. Is that included in the statement heretofore made by you?

Answer. No, sir, it is not; because there wasn't any assessment made for that paving at all; neither for the old paving, nor for the new work, we did this prior to the time the street was paved with asphalt.

Int. 192. That work was done in what year?

Answer. That was done in 1903.

Int. 193. The remainder of the street was afterwards paved with asphalt?

2533 Answer. Yes, sir. I might say in regard to that Grand Avenue street the company in changing that work, we paved over a foot north of the north rail to a foot south of the south rail of the south track.

Int. 194. The expense of doing that is not included in the amount heretofore given by you as being paid for assessments, because no assessment was made?

Answer. No, sir. No assessments were made on that; that was not included in any of the previous statements I have made.

Int. 195. That street had been ordered paved with Asphalt from West Fourteenth to West Twenty-eighth Street?

Answer. Not at that time; it was ordered after that time; that was ordered paved with Asphalt in 1904, I think, and this work was done in 1903.

Int. 196. Was it done in anticipation of the repavement of the Street?

Answer. No, sir.

Int. 197. Just done because it was required to be done.

Answer. Yes, sir; done because we wanted to double track there for the convenience of handling our traffic; we wanted to put it permanent; we knew the street would have to be repaved sooner or later.

Int. 198. A resolution has been offered in evidence providing for tracks on Grand Avenue, from West Sixth Street to East Ninth street, the resolution having been adopted by the City Council upon the petition of certain property owners; you may state if at the time this resolution was passed, the plaintiff company had a track parallel to this portion of Grand Avenue and distant from it less than two blocks?

Answer. It did.

2534 Int. 199. Had a track on Locust Street?

Answer. Yes, sir.

Int. 200. After this resolution had been passed, what is the fact as to whether the company constructed a track on Grand Avenue from West Sixth Street to East Ninth Street?

Answer. Yes, sir. It constructed a double track, first, having the amount of paving to be taken up assessed by the proper City Authority and payment made for the same.

Int. 201. Is that included in the estimate heretofore made?

Answer. Yes, sir.

Int. 202. What was the length of this track?

Answer. About 10844 feet.

Int. 203. You gave it in single track lengths?

Answer. Yes, sir.

Int. 204. A house moving ordinance has been introduced in evidence which was passed by the City Council June 1, 1903, I ask you, Mr. Hippee, if there were any trolley wires or street railway feed cable wires maintained in the City of Des Moines at the time of the passage of that ordinance, other than the trolley wires and cables of the plaintiff company, and you may state whether also there has been any street railway company operated in the City of Des Moines since 1893, except the Des Moines City Railway Company?

Answer. No.

Int. 205. That applies to both branches of the question?

Answer. Yes, sir.

Int. 206. An ordinance has been introduced passed June 8, 1903, relating to tracks on which the Company was authorized to carry freight; please state whether, as provided by such ordinance, the tracks of the Company in front of the Library Building on West First Street were removed, and if so, were new tracks con-

2535 structed on West Second Street?

Answer. The old tracks were removed and new tracks were constructed.

Int. 207. What was the length of the new tracks constructed?

Answer. The length of the new track on West Second Street was about 800 feet.

Int. 208. Resolutions have been introduced in evidence providing for notice to the Company to pave certain streets; are the streets referred to in the notice which has been introduced in evidence, Exhibit 226, and the other notices referred to in the stipulation, included in the statement of these paving assessments as heretofore stated by you?

Answer. The notices to the Company to pave certain streets as referred to in Exhibit 226, and other and similar notices referred to the same statement of paving as I have heretofore made; that is, the paving on Walnut Street, West Walnut Street, East Walnut Street, East Twelfth Street West Twelfth and Thirteenth Street and West Scott and West Tenth Street.

Int. 209. And the amounts paid upon appraisement appropriated is included under the other statement?

Answer. Yes, sir; they are included under the other statement.

Int. 210. A resolution has been introduced in evidence dated August 17, 1904, with reference to an extension on West Fourth Street to North Street; what if anything was done in response to but resolution?

Answer. This piece of track was extended as requested.

Int. 211. State the length of track constructed and when?

Answer. The track was constructed in 1904 and was about 1700 feet long.

2533 Int. 212. An ordinance was passed by the City Council of the defendant City, September 8, 1903, entitled An Ordinance to prevent accidents at the Street Car Waiting Room; you may state, Mr. Hippee, what the situation was at the Street Car Waiting Room at the time of the enactment of the ordinance?

Objected to on the part of respondent as being immaterial.

Answer. The waiting Room is a room provided by the Company on the corner of West Sixth & Mulberry streets, for the convenience of the passengers waiting to take the cars, or transferring from one line to another. All cars in the City pass this corner, as a consequence the street is crowded, not only with cars but with passengers alighting from and boarding the cars; it was this condition, I suppose, that induced the passage of this ordinance.

Int. 213. A resolution adopted by the City Council September 21, 1903, has been introduced in evidence; the resolution related to the construction of certain lines of track; what is the fact, Mr. Hippee, as to whether there were parallel lines within less than two blocks at the time in question, rendering such resolution necessary under the terms of the ordinance of March 8, 1890, amending the Turner ordinance.

Objected to on the part of respondent as being immaterial and incompetent.

Answer. Yes, sir; some of these lines referred to in that resolution were parallel with streets that already had street railway lines on;

for instance, West Seventh Street, they Wanted to be tracked parallel with Sixth Avenue.

2537 Int. 214. After the adoption of that resolution what lines were built?

Answer. There was a line commencing at Seventh & Grand, thence running north to Park; thence west on Park to Tenth; thence north on Ninth to Center; West on Center to Tenth, where it connected with the center Street line; and then beginning again at Seventeenth and Center and extending North on Seventeenth to University Avenue; thence west on University Avenue to Twentieth; thence north on Twentieth to St. Joe Street.

Int. 215. Before these lines were built, was an assessment made by the City for the paving and appurtenant of the paving, and was the amount of the appraisement paid by the Company, and is it included in the list of paving so paid as heretofore set out?

Answer. Yes, sir; the amount paid was included in the list heretofore set out.

Int. 216. A resolution has been offered in evidence passed by the City Council, November 17, 1903, relative to the construction of the Melan Arch Bridge across the Des Moines River on Sixth Avenue; what if anything, has been done under this resolution?

Answer. Under this resolution the poles required for placing on this bridge were purchased shortly after the resolution was passed, but the construction of the bridge has not yet reached the stage where the tracks can be laid or the poles erected.

Int. 217. What kind of poles were required?

Answer. It was an iron pole, a combination pole to be used both by the street railway and the Electric Light Co; the purpose
2538 of that was so that we wouldn't both set a line of poles on the bridge.

Int. 218. What kind of poles had been mainly used for the construction of car lines?

Answer. Before that time, it was exclusively wooden poles, which were used all over the City.

Int. 219. Since that time however?

Answer. Since that time; not since that time, but a short time after that, about the time we reconstructed the pole situation and wire situation in the business district of Des Moines, we installed and placed iron poles throughout the portion of the system, what we call the business district.

Int. 220. Was that by reason of any request or resolution of the City Council?

Answer. There was a resolution that was introduced in 1904 in regard to an amendment to a pole and wire ordinance that was then in effect, in which they made changes in that ordinance so that we could set our iron poles up. In other words, before that time we had been using telephone poles, electric light poles, just wherever we could hitch on to them. The ordinance referring to electric poles placed them at too great a distance apart for street railway wire poles to be put up and safely carry wires. This amendment reduced that distance I think 100 feet at which the poles were to be placed apart; then we placed our iron poles under that in the business dis-

trict. I call the business district, from West Ninth to the River, an
from south Grand Avenue to Court Avenue; with the exception
the territory around the court house, around the south part
2539 the loop, which wasn't changed at that time, for the reas
that the fence and everything around there we figured bein
changed, when everything was cleared away.

Int. 221. Referring your attention to the resolution relative to th
Melan Arch Bridge, were you consulted as to that matter, and i
adoption?

Objected to on part of respondent as being immaterial and in
competent.

Answer. Yes, sir; but there was a resolution introduced ther
ordering us to put our tracks across the bridge, we were not consulte
in.

Int. 222. The track has not yet been constructed?

Answer. No; it cannot be; the bridge is not in shape to have i
constructed.

Respondent moves to strike the answer as not responsive.

Int. 223. When was that?

Answer. That was just a little prior to this time.

Int. 224. The ordinance, Mr. Hippee, which you have been re
ferring to and which preceded the change in the character of the
poles in the business district, is the ordinance introduced in evidence,
passed September 20, 1904?

Answer. Yes, sir; that is the one I refer to.

Int. 225. That change was made in what year?

Answer. Made the same year.

Int. 226. 1904?

Answer. Yes, sir.

Int. 227. Mr. Hippee, the ordinance you have been referring to
has been introduced in evidence as Exhibit No. 215, hasn't it?

Answer. Yes, sir.

2540 Int. 228. A record of the proceedings of the City Council
has been introduced in evidence relative to a petition, dated
March 10, 1905, as to tracks on Main street through Central Place,
what was done in this connection?

Answer. Those tracks were re-constructed so as to comply with the
request of the petitioners.

Int. 229. Records have been introduced in evidence dated May 1,
1905, requesting modifications of the Company's line on Bluff Street,
what was done in this connection?

Answer. These tracks with the poles were changed as requested in
the motion and room was provided between the tracks and the poles
for teams to drive, as required by the motion referred to.

Int. 230. A resolution has been offered in evidence, dated May 1,
1905, relative to bringing Madison Square Avenue to a practical
grade, between Fountain Avenue and Summit Street, what was done
in response to this, state fully?

Answer. This street was brought to grade so that the tracks could
be laid across the same.

Int. 231. A resolution was introduced relative to removal of tracks on front Street, the resolution passed May 20, 1905, what tracks are therein referred to?

Answer. The tracks which I referred to in connection with the amendment to the freight ordinance, passed June 8, 1903. This resolution required compliance with the terms of that ordinance. There was a question that was raised after the ordinance was passed, as to whether a vote of the people was necessary as to the line on second street; whether it could be substituted for a line on Front or First Street, and the Company had hesitated to remove the tracks on First Street, with this doubt as to Second Street.

2541 Int. 232. So that hesitation or delay was the occasion for resolution?

Answer. Yes, sir.

Int. 233. Referring to the various tracks to which your attention has been called in detail, and also the improvements to which your attention has been called, I wish you would state whether these tracks are all now being operated as a part of the system of the plaintiff company?

Answer. Yes, sir; they are.

Int. 234. What improvements and additions have been made in connection with the Power House, shops or car barns of the Company since the 1st of January, 1898?

Answer. Since that date the Company constructed a new fire-proof power building, in which are located two engines and two direct connected generators; each of these generators are 1000 K. W. There is also in this same building a new boiler plant, consisting of 8-440 horse power each water tube boilers, with the necessary stokers, pumps, pipes, fittings, condensers, and all different fixtures that go to make a complete and efficient power plant for the purpose of generating power for the operation of cars of this Company and the Inter Urban Company. The old power plant was about 1225 horse power. The old engines and generators are maintained for use in emergencies. We also constructed shops of the size 137 x 252 feet. This building is two stories high, of brick; it is not of fire proof construction. It is what is called an improved slow burning construction. The building in which the shops are located is divided into a repair section in which cars are repaired and overhauled. The machine shops, in which the heavy iron working machinery

2542 is located, black-smith shop, adjoining the machine shop, which is equipped with necessary machinery to furnish a complete black smith shop as an adjunct to the Machine Shop; the armature repair shop, in which all armatures and all electrical appliances used about the cars and machinery are repaired and overhauled. There is also located in this building a wood-working shop in which various pieces of wood working machinery are installed; this is used in repairing and rebuilding old cars and building new cars. We have facilities in these shops to build complete car bodies, new clear through. There is also located in these shops a paint department in which new cars are painted and finished completely and the old cars are repainted, re-varnished and renewed.

In the second story of this building is located the store house department in which the supplies that are used around the shops and power plant, line department, track department, and in fact all the departments, of the road are received and distributed. This Company also constructed and built a car barn on West Twenty-fourth & Ingersoll Avenue, size 125 x 252 feet, with a capacity for housing and taking care of 80 cars; there is also constructed an addition to the second street car barn with a capacity for housing in this addition about twelve cars.

Int. 235. I wish you would state whether at any time after the first of January 1898, and up to about the time this suit was brought the City of Des Moines, in any way, to your knowledge, questioned the right of the plaintiff company to construct, maintain, operate these tracks and other tracks in the City?

2543 Objected to on the part of respondent as being immaterial and incompetent, for the reason that the City cannot waive any of its rights in this matter by remaining silent.

Answer. It did not.

Int. 236. You will please state whether at any time after the first of January, 1898, until about the time this suit was brought, the City of Des Moines either claimed that the Turner ordinance passed December 10, 1866, had expired by limitation of time, or that the grant thereunder was not permanent?

Answer. It did not.

Int. 237. Mr. Hippee, I will ask you this question: whether at any time either before or after the 1st of January, 1898, and up until shortly before this suit was brought, the City of Des Moines questioned or made any claim that the Turner Franchise was not permanent?

Objected to on the part of respondent as being immaterial and Incompetent.

Answer. I never heard of an objection being made by the City of Des Moines or the officers of the City of Des Moines that the franchise was not perpetual. On the other hand, I have heard it conceded by the officials of the City of Des Moines. Prior to this time it was generally understood that the franchise was permanent.

Respondent moves to strike the answer as not being responsive.

Int. 238. Were you present at a meeting of the City Council in 1889, perhaps September 5, the time the consolidation reso-
2544 lutions were adopted, or at the time the arrangement for consolidation was finally consummated?

Answer. Yes, sir.

Int. 239. I wish you would state whether or not anything was said at that meeting by the representatives of the City with respect to the Trumer Ordinance being perpetual, and if so, what was said, by whom said?

Objected to on the part of respondent as being hearsay.

Answer. At the time of that meeting they passed the consolida-

tion resolution, there were present representatives of the Sherman interests, or the Street Railroad Company; the representatives of the Des Moines Sevastopol Street Railroad Company, and the Des Moines Broad Gauge or the Des Moines Electric Railway Company; Mr. Polk, representing himself and his associates, with his counsel was also present at this meeting; Governor Cummins was present at this meeting; Mr. Dietrick, the City Solicitor was present.

Int. 240. In what capacity was Governor Cummins present?

Answer. Mr. Cummins was counsel for the City in one of the cases cancelling the franchise of the old street railroad company then pending.

Int. 241. What City Officials were present?

Answer. The Mayor, the City Council, the City Solicitor and the City Clerk was there; I don't recollect whether any of the other officials were or not. The question was then, the prominent question that was before them that evening was, that the Des Moines Street Railroad Company under the Turner Franchise wanted the right to equip electrically, and erect poles and wires; they
2545 also wanted that suit wiped out of existence before they would pay this money over, make the first payment on this consolidation proposition.

Int. 242. Right there I want to call your attention to the fact that in the first consolidation resolution no provision is contained for the use of electricity as a motive power; that is embodied in the second resolution; can you explain that in connection with your other explanations?

Answer. No, sir; I cannot, except I know that that was the question; the first place, they wanted that suit wiped out, cancelling the charter. It was contended by the City officials and by Governor Cummins as the counsel for the Mayor and the City, that if they cancelled that suit and permitted this consolidation—they all wanted this consolidation to go ahead—they all said it was for the good of Des Moines to consolidate these properties, but they wanted one additional clause put in there; they wanted the street railroad people to waive their right to put a track on every parallel street; they said, these parties have a permanent franchise here; if you go into this consolidation, you have permanent rights on all our streets. At that time it was considered the operation of a street electric railway was a dangerous proposition; the statement was made, they wanted some streets for driving purposes; they asked that the waiver be made that the street railway company wouldn't occupy parallel streets without the consent of the City Council to do so.

Int. 243. That is the meaning of the consolidation resolution which provides for the acceptance of changes in the Turner ordinance?

Answer. Yes, sir.

2546 Int. 244. Do you recall by whom the statement was made as to the perpetual character of the Turner ordinance among the representatives of the City?

Answer. The statement was made by the City Solicitor; the statement was made by Governor Cummins, as counsel for the Mayor and the City.

Int. 245. Do we rightly understand that that fact, that the fact that the Turner Ordinance was perpetual and went on forever, was the argument used to enforce the demand for an acceptance of the amendment which should restrict the Car Company and prevent it from occupying parallel streets nearer than two blocks?

Answer. Yes, sir.

Int. 246. That is the idea?

Answer. Yes, sir.

Int. 247. At that meeting, at that time, in connection with that matter, did any person question or deny the statement that the Turner Franchise was perpetual, went on forever?

Answer. No, sir; it was conceded by all that it was. It was one of the arguments held out by Mr. Baylies of the Broad Gauge Company, chaffering back and forth there; Mr. Polk saying, your price is too high, I don't want to make any concessions, and Mr. Baylies saying, you are getting a right that is going to be very valuable in the future.

Int. 248. Then that argument, that statement was made by Judge Bylies to overcome Mr. Polk's hesitancy in regard to the enterprise?

Answer. By Mr. Baylies and Mr. Van Ginkle.

Int. 249. Was that made in the presence of the Council and Mayor in the open session?

2547 Answer. Yes, sir; Mr. Kauffman was there as Mr. Polk's attorney at that time.

Int. 250. Is the meeting to which you refer to, the one at which the matter was finally consummated and at which Mr. Polk exercised his option of paying a part of the purchase price?

Answer. Yes, sir; paid ten thousand dollars at that meeting, handed by him over there after that resolution was passed, what was called the consolidation resolution, after that was passed.

Int. 251 You now refer to both of the resolutions?

Answer. Yes, sir.

Int. 252. At that time the use of electricity was new, wasn't it?

Answer. Yes, sir.

Int. 253. Was it in use in any other City as a motive power?

Answer. Only one other City at that time had tried the use of electricity for power, and that was Richmond, Virginia. It was tried a very short time before the first installation in the City of Des Moines.

Int. 254. The Des Moines Electric Railway is the one that installed the system here?

Answer. Yes, sir.

Int. 255. That was the second?

Answer. That was the second; they were practically at the same time. There were two companies started to project electric railways in this country; one was the Sprague Electric Company, the other was the Thompson Houston Co., of Lynn, Massachusetts. The Sprague Company got into Richmond, Virginia, and the Thompson Houston Co., got the Des Moines Right to try the system; it was the first right in the United States to try that system which is in effect generally.

2548 Int. 256. The events to which you have referred occurred in September, 1889; how long had the Des Moines Electric Railway been operating with electricity?

Answer. Well, it had been two years, probably, or a year and a half before that time.

Int. 257. Wasn't it in the spring of 1888?

Answer. I think it was in 1888 that the first electric car was tried.

Int. 258. It hadn't been long, at any rate?

Answer. No; I am very sure it was in 1888.

Int. 259. The construction at that time was in its infancy and crude?

Answer. Yes, sir; everything about it, the cars, crude motor cars, the construction of the overhead line and the track.

Int. 260. Isn't it also true, Mr. Hippee that under the system of construction then, under certain conditions, a horse stepping on the track would receive a shock and fall down?

Answer. Yes, sir; I know of a number of cases before and after we took the road.

Int. 261. Didn't that give rise to a very strong feeling that there ought to be some streets free from that assumed deadly agency?

Answer. Yes, that was talked about, and we almost all had to concede it was dangerous.

Int. 262. That gave rise to the demand by Governor Cummins and other representatives of the City that there should be some modification of the franchise so as to restrict it in the manner stated in the resolution?

Answer. Yes, sir.

In. 263. You have stated that it was urged in support of that, that the demand was just and reasonable, because the Turner franchise was perpetual and would go on forever, and there
2549 ought to be that protection to the City, is that as I understand it?

Answer. Yes, sir.

Int. 264. On the other hand, to overcome Mr. Polk's doubts and hesitation, it was urged in statements made at that meeting, that inasmuch as there was a perpetual right under the Turner Franchise, with the growth and development of the City, it would be a good thing?

Answer. Yes, sir; that was the argument used.

Int. 265. Then, Mr. Hippee, you may state if it was your understanding and belief at that time, and continued to be your understanding that the Turner Franchise was perpetual?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; that was my understanding at the time.

Int. 266. And has continued to be your understanding?

Answer. Has continued to be our understanding; yes, sir.

Int. 267. You may state whether the moneys expended by the Company upon the street car properties since the 1st day of January, 1898, were expended in reliance upon the construction placed

upon the Turner Franchise or ordinance, by both the City and the Company, to the effect that the right would not expire, but was perpetual?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; that money was spent with that understanding and that belief.

Int. 268. What is the fact as to whether there has been a large expenditure of money for new and additional equipment and rolling stock since January 1, 1898?

2550 Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; there has been a large expenditure, practically all the equipment in use the 1st of January, 1898, has been renewed and replaced by new and better equipment.

Int. 269. What is the fact, Mr. Hippee, as to whether that expenditure was also made upon the faith of the Turner Franchise and upon the assumption that it was perpetual.

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; that expenditure was made under that belief.

Int. 270. Would any of those expenditures have been made but for the fact of the assumed perpetual character of the Turner franchise?

Objected to on the part of respondent as being immaterial.

Answer. No, sir; they would not.

Int. 271. If the Company and its representatives had not believed when these investments and expenditures for equipment, etc., were made, that the ordinance of December 10, 1865, constituted a contract between the Company and the City, giving to the Company a perpetual right to maintain and operate its tracks, would the expenditures have been made?

Answer. They would not.

Int. 272. State whether or not any of these investments would have been made if the City had not acquiesced in the construction and regarded the ordinance as perpetual?

Objected to on the part of respondent as being immaterial.

Answer. No, sir; they would not have been made.

Int. 273. In order to successfully operate and maintain a
2551 street railway system of the complainant company and to furnish adequate street railway facilities to the residents of the City of Des Moines, what is the fact, as to whether it will be necessary from time to time to make changes in the line and make extensions and additions to the present lines?

Answer. Such changes and additions will be necessary from time to time to furnish adequate street railway facilities for the people of this City.

Int. 274. Why, what is the occasion for that?

Answer. Well, Des Moines is comparatively new and rapidly

growing City, like most western cities; constant extensions are necessary in order to keep up with the growth of the City, to furnish adequate facilities for the outlying portions, changes and modifications of the line are necessary from time to time; the business center changes somewhat and the increased traffic demands an increase in facilities.

Int. 275. I will ask you whether or not the growth of the City and the extension of the residence limits of the City has not surpassed the expectations of the officers of the Street Railway Company, as they viewed the matter in 1889?

Objected to on the part of respondent as calling for the opinion of the witness.

Answer. Yes, sir; it has. It has gone way beyond; the extensions and improvements we had to make in the property; we had no idea of such a thing. It has required thousands of dollars more than we had ever contemplated at that time.

Int. 276. That rapid growth, has it not been the occasion of the use of the income of the Company in extensions and indebtedness which was incurred largely?

2552 Answer. That largely accounts for it, the rapid growth of the City, and also the fact that we were practically pioneers in electric railroading, and had to take what manufacturers would give us. In other words, they were experimenting and we were paying for that stuff on our roads; and the two items, the growth of the City and the changes in the matter of electric power and propulsion has made a very heavy outlay for the Company.

Int. 277. That growth of the City, I apprehend, was the occasion later of the frequent petitions of property owners for extensions of lines to which reference has been made in testimony?

Answer. Yes, sir; for the purpose of developing the outlying territory and bring their property nearer the business center and market.

Int. 278. You were hardly able to keep up the demand for extensions?

Answer. Yes, sir.

Int. 279. In the growth of the City there were residence districts outlying with intervening unsettled and sparsely settled districts?

Answer. Yes, sir.

Int. 280. And in constructing lines to accommodate the outlying districts, the lines had to pass through relatively thinly settled parts?

Answer. Yes, sir.

Int. 281. Were those lines remunerative always?

Answer. No, sir, they were not. There is another thing I might add in connection with that: when you extend your lines to outlying districts, to give satisfactory service out there, it means double tracking your inside lines; to handle your service properly, you;

2553 cannot handle it on side tracks and switches to the satisfaction of the Company's point of view or the traveling public; if these extensions had not been forced upon us a good deal of double tracking would not have been necessary.

Int. 282. What has been the policy of the Company with respect to extensions?

Objected to on the part of respondent as being immaterial.

Answer. Our general policy has been to push it every year into such sections as we thought most demanded such extensions and improvements; in other words, we wanted to keep a little ahead, if we could.

Int. 283. The City of Des Moines has how many square miles?

Answer. 54 square miles.

Int. 284. You have stated that some lines, at least, were not remunerative; I want to ask you this: whether the policy of the management look toward the building up of a system accommodating citizens of the various districts remote and nearer in with reference to the future as the source of income rather than the present?

Answer. Our whole lines since we acquired control of the property have been laid out with the idea to a unified system. Where we build out into territories at the present time and go through territories that are not remunerative, we figure that line will build up that territory and in time the line will pay and be a good line.

Int. 285. So that you are building for the future?

Answer. Yes, sir; we were building for the future.

2554 Int. 286. Now, Mr. Hippee, have the Company's officers, in pursuing the policy which you indicate, making its expenditures, and developing the system, relied upon the assumption and belief that the ordinance referred to as the Tramer Franchise was perpetual?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; we relied upon that fact. If that hadn't been so we would be limited to the 1898 termination of this franchise; we would not have one-half the mileage track, nor the equipment.

Respondent moves to strike the answer as not responsive.

Int. 287. During all this time, as you have stated, there never had been a claim made that the franchise was not perpetual, except shortly before this suit; is that right?

Answer. Yes, sir.

Int. 288. Reference is made in the Bill in this case to a resolution passed by the City Council of the City of Des Moines, December 13, 1905; what is the fact, Mr. Hippee, as to whether shortly prior to the passage of this resolution, the Des Moines City Railway Company had determined upon and was preparing to make extensions and additions to its track power plant and equipments?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir; it was preparing to make extensions and additions as indicated above.

Int. 289. What was the necessity for such extensions and additions?

Answer. They were necessary on account of the growth of the

business of the City and in order to maintain the efficiency
2555 of the service*m* to enable the company to give satisfactory service.

Int. 290. What particular extensions of and additions to the tracks had been so determined upon?

Answer. It had been determined to build a line on Polk Boulevard, from Ingersoll Avenue to University Avenue; that is nearly a mile, I think; to build a line on West Fifth from Cherry south to south Jefferson Street, to connect with the Army Post line where it crosses Jefferson Street; and it had also been determined to build a line down on West Seventh Street, from School to Jefferson, the purpose of this line was to furnish a double track for the Sixth Avenue and West Ninth Street Lines, as the service in that part of the City cannot be handled on side tracks and switches; the idea was to send the cars up Sixth Avenue and Ninth Street, and all down on Seventh Street, on account of the complaint that the streets were too narrow to double track Sixth Avenue and Ninth Street. There was also an arrangement made for extending the Sixth Avenue line from Jefferson north across the Melan Arch Bridge to Euclid Avenue, where it connects with the Belt Line track, and if this extension was made, then the Belt line track instead of operating the way it does now, would have been extended north past Highland Park College and connect with the Interurban line a little distance north of the College, through that section. Then it was also proposed to make an extension on East Fourteenth Street, from Walker Street North along what was known as Fourteenth Street to the Poor Farm road, across the Northwestern tracks, and up north, somewhere near, I think, what is called Hull Avenue; I am not sure. These improve-
2556 ments, this track work we estimated would cost in the neighborhood of $130,000.

Int. 291. What improvements with respect to the plant were in contemplation?

Answer. We also had in contemplation putting in the power plant, a new unit; I mean a new engine and generator; what we had figured on was a steam turbine with a direct connected generator. Where we have a thousand K. W. generator, we intended to put in 1500 to 2000 K. W.

Int. 292. What was the estimated cost of that?

Answer. It was a good deal of an estimate, but we estimated at that time, roughly, it would cost $150,000 to $200,000 to install this unit —.

Int. 293. What steps had been taken by the Company towards making these extensions and improvements?

Objected — on part of the respondent as being immaterial.

Answer. These extensions and improvements,—the question of raising money with eastern financiers;—we have got to raise money by bonds to do this work. It costs more than we get out of the net earnings. The proposition had been taken up with eastern representatives of eastern bond houses to buy these securities and furnish us money to do this work. Where the extension of tracks were put

on paved streets, there had been nothing done as to these extensions. These were extensions mapped out prior to the passage of this resolution by the City Council. But as to the extensions we were working on during the year 1905, we had asked the City Council to make assessments of the amount of the pavement where we wanted to distribute it on paved streets on which we didn't have tracks,
2557 to have the assessment made so that we could go ahead and lay our tracks on these paved streets, and the City Council made such assessments, had such assessments made.

Int. 294. Will you produce a copy of the resolution of the City Council?

Answer. Yes, on page 127, Journal of the City Council. Here is a certified copy of it, right here.

Int. 295. Is Exhibit 227 a certified copy of that resolution of the City Council?

Answer. Yes, sir; that is the one for the work contemplated in 1905.

Complainant offers Exhibit 227 in evidence.

Int. 296. Referring your attention to the resolution, Exhibit 227, I wish you would state on what streets there mentioned the work had been completed prior to the commencement of the present controversy?

Answer. The work had been completed on West Grand Avenue from Twelfth to Fourteenth Street; that is where we were double tracking that street. And also where we were double tracking University Avenue, from Twenty-fourth to Twenty-ninth Street.

Int. 297. Why wasn't the remainder of the work completed?

Answer. By the time we got ready for the remainder of that work, this controversy had started up and we didn't care to go ahead with it.

Int. 298. What necessity was there for the proposed extensions?

Answer. They were required in order to increase facilities with which our passengers could be handled so as to maintain the effieiency of the service. Most of these improvements are in the nature of double tracks.

2558 Int. 299. What occasion was there for the improvement to the power plant and the additional unit?

Answer. That was to give us adequate power to handle our business. We needed another engine and generator. The present needs of the Company are taxed to almost the limit of the present power plant; it is up to its capacity; we have got to have surplus power to provide for the growth and for extra rush business and accidents that are liable to happen in the power plant.

Int. 300. What effect would it have in reference to the value of the street car company's property, if the City were to tear up the tracks or any substantial portion of them?

Answer. The entire value of the plant would be destroyed; the Company would be unable to render substantial service to the public.

Int. 301. I wish you would enlarge upon that subject and explain how and why that would be so?

Answer. Why, for instance, if we should go out on the East

Ninth Street line and tear out the Ninth Street line, tear up a portion of the track, you would have no terminus on East Ninth Street. The same thing would apply to the Belt Line if you would tear that up anywhere near the Belt line Bridge; in other words, if you tore the Belt line up at Second and Corning Avenue, a man could ride on Euclid Avenue to Second and stop there.

Int. 302. You are having in mind now the idea of tearing up the tracks constructed prior to 1889 or some subsequent period, and leaving the ones subsequently constructed alone in this view?

Answer. Yes, sir.

2559 Int. 303. Would there be any way to operate isolated portions of the track without separate power houses?

Answer. There would be a way to operate without separate power houses if you had a right to transmit your power throughout the City; without that, there would be no way to operate without separate power houses.

Int. 304. What would be the result if the Company were not permitted to make extensions from time to time, both in its lines and its power plant?

Answer. Why, the service would soon prove inadequate, deteriorate and become unsatisfactory to the public; you have got to keep up with your growth of business and the growth of the town.

Int. 305. What was the character of the service rendered by the Company up to the time this suit was brought?

Answer. The amount of mileage and population served and the car tracks, equipment and arrangement of the lines, transfer facilities, and in the frequency of the service, I believe it was as good as any City the size of Des Moines in the United States, if not better. My own judgment is, many cities much larger than Des Moines have a much inferior service, and Des Moines has the best service of any cities of its class.

Int. 306. You are familiar with the car service of many cities?

Answer. Yes, sir.

Int. 307. About what is the population of the City of Des Moines?

Answer. It is estimated from 80,00 to 100,000.

Int. 308. About how many passengers does the Company carry each day on its lines?

Answer. Last year the average was 41,313.

2560 Int. 309. What is the fact, whether the majority of the people who use the cars of the Complainant Company have other means of transportation from one part of the City to the other?

Answer. I believe they have no other method of transportion and rely very largely upon the car service.

Int. 310. What mail service does the Company render?

Answer. Mail boxes are attached to all the regular cars and the cars stop wherever citizens desire at regular stations, in order to permit them to mail their letters in these boxes. The mail is periodically collected from these boxes at the waiting room by an employé of the Post Office Department. The Company also transports mail in pouches or sacks between the various post offices in the City, and the various sub-stations, and carries mail carriers of the

Post Office Department a limited number of trips every day when on duty with their pouches.

Int. 311. Wasn't this Company a pioneer in that business?

Answer. Yes; after it had been tried at once time between Minneapolis and St. Paul and rejected by the Post Office Department that it wasn't practical, we insisted on a trial of it here, and for two years operated mail boxes on our cars here free; the Government wouldn't compensate us for it. We had kept a record of the amount of mail collected against the amount the mail carrier would collect to show how the people were using it.

Int. 312. Mr. Hippee, it has proven to be a success?

Answer. It has proven to be a success; the Post Office Department now has it installed in a number of cities.

Int. 313. Mr. Hippee, since January 1, 1898, what has been the character of the track construction of the Company on paved
2561 streets; I wish you would give the weight of the rails, size, kind and its foundation under the rails, and indicate whether the construction is of a permanent character or not?

Objected to on the part of respondent as being immaterial.

Answer. The construction has been of a permanent character; a large portion of the ties, 90 per cent. of the ties used in the construction of the road have been oak ties, what is called standard street Railway size, 5 x 7 x 7; the rails have all been heavy rails, ranging from 70 to 85 and 90 pound, which has been laid. Where it is laid in paved streets, the ties have all been imbedded in concrete and all have the concrete tamped under them; that is the ties and track is first laid and thoroughly tamped and settled by running heavy trains over it, and then as the concrete is laid on the street that is a second time pounded under the ties; and in some construction the ties have been cut in what is called V-shape on each side. This ties is imbedded in the concrete, is supposed to be held there and cannot go down for spring up. This method of construction, as I understand it was a part of the United States Government specifications in laying some heavy floors or timbers, where there is heavy driving, etc., and has proved very successful here. On special work, such as crossings and switches, it has all been of the heaviest and most approved design that we could get to put in where the heavy work comes over these lines. Some of it was laid last year on Walnut Street at intersections on Second, Fourth and Fifth Street;
it was laid on about six to eight inches of crushed stone,
2562 thoroughly tamped; on the intersections from Sixth to Seventh it was laid on from six to seven inches of Portland Cement concrete. These two methods were employed here by the permission of the City Engineer, for the purpose of testing them, to see which would make the best foundation. The track bonding has all been done by the most improved up-to-date method known for bonding rails; this is to prevent the return current escaping and injuring, particularly horses when they step from one rail to another, because they are more sensitive to the electric current than any other animal. The overhead construction has been modern

and up-to-date; there has been large expenditures made for heavy cables and feed wires to carry the current to the different parts of the City for distribution over the different lines.

Int. 314. What is the probable or estimated life of a track, laid, for instance, as you have described it, with oak ties, imbedded in concrete cement?

Answer. That is a pretty hard question to answer. I do not believe I can tell you what the life of a track is. I can only answer by saying that the more solid the foundation is, the more rigid it is, the quicker your track will wear out; I refer to the rails now; they are going to disintegrate and pound to pieces. There seems to be something about the electric current that threatens their life much more than the ordinarily travelled steam rails. The wheels, or part of the wheels on every car are the driving wheels which correspond to the driving wheels of an engine. Where you have a rigid foundation, you have a rigid pound on your rail. We had the best proof of that from the fact that after we had just installed a piece
2563 of track on Sixth & Walnut Street, West Des Moines; the representative of the Page Iron Works from whom we bought the special work was here and when he looked at the foundation, he simply stated there was no material made that would stand such a rigid foundation as that.

Int. 315. So you can't answer as to the probable life then—where it is simply imbedded so as to give elasticity, is it known what is the life of a track?

Answer. I don't believe it is, Mr. Read. Electric railroading, in the last 15 or 20 years has been a constant succession of experiments. It has been an experiment from the light horse car rails to the exceedingly heavy rails of to-day. We have some lines we have re-laid within the last 18 years three times; that was partially due to the fact that the first rails we put down were'n't heavy enough; but since 1898 we have been putting down nothing but the heaviest construction. There is another thing,—a rail don't have to wear out all over; a rail worn out at the joint, and the rail is gone.

Int. 316. Referring to the Walnut street construction, the ties should be durable under those conditions?

Answer. Reasonably durable, yes, sir.

Int. 317. They should last for a good many years?

Answer. O, they should last for a good many years; but I couldn't say those ties would last over 15 years at the very outside.

Int. 318. I show you ordinance No. 1129, copy, marked Exhibit 228, and ask you to explain the circumstances connected with the enactment of that ordinance?

2564 Answer. This ordinance was passed by the City Council establishing grade on Clark Street from Twenty-seventh to Thirteenth Street, on June 27, 1901. The people living west of Twenty-seventh street wanted the street railway line extended. There was a portion of the street just west of Twenty-seventh street which had a greater per cent. of grade than I wanted to run the cars over as a permanent feature and insisted the grade on the street should be made as provided in this ordinance. They said they didn't have

enough money to put the street to that grade at that time and wanted to know if the grade was established if I would not consent to lay the track, and then when the street was permanently improved, the street would be put to the grade as shown by the ordinance. I agreed with that, with the qualification that the ordinance should be made that the grade on the street should not be changed without the consent of the abutting property owners and the Des Moines City Railway Company, and that is what the ordinance shows.

Complainant here offers in evidence Exhibit No. 228.

Complainant offers in evidence Exhibit 229, the same being a certified copy of the record of the District Court of Polk County, Iowa, in Case No. 1377, Law, wherein the City of Des Moines was plaintiff and the Des Moines City Railway Company defendant, showing settlement and dismissal of the case.

Objected to on the part of respondent as being immaterial.

2565 Complainant also offers in evidence Exhibit 230, the same being a certified copy of the record of cause No. 1375 in the District Court of Polk County, Iowa, wherein the Des Moines Street Railway Company was plaintiff and the Des Moines Broad Gauge Street Railroad Company and others were defendants, showing settlement and dismissal of said cause.

Respondent interposes the same objection as last above made.

At this time the further taking of testimony was adjourned until 9:30 o'clock, A. M., April 18, 1906.

And now, April 18, 1906, at 9:30 o'clock A. M., the further taking of testimony was resumed, as follows:

Mr. G. B. HIPPEE, being recalled for cross-examination, examined by MOSE COHEN, testified as follows:

Cross-int. 1. I think you testified that Exhibit B shows the lines in operation at that time, up to 1889?

Answer. Yes, shows the road up to 1889.

Cross-int. 2. Have you a plat in your office made about that time indicating the streets on which your lines were built?

Answer. Yes, sir.

Cross-int. 3. And this is practically a copy of that?

Answer. Yes, sir; I also was personally familiar with the lines at that time.

Cross-int. 4. You were't though, general manager?

Answer. Yes, sir, I was general manager the 1st of October, 1889.

2566 Cross-int. 5. When was that consolidation?

Answer. The first of October, 1889.

Cross-int. 6. The Des Moines Street Railway Company is now owned by the Des Moines City Railway Company, is it not?

Answer. Yes, sir.

Cross-int. 7. That Des Moines Street Railway Company is that the Company which was the owner of the franchise in question, known as the Turner Franchise?

Answer. Yes.

Cross-int. 8. The Des Moines Broad Gauge Street Railroad Company, that is, the franchise owned by the Des Moines Broad Gauge Street Railway Company, was that transferred to the Des Moines Street Railway Company or to the Des Moines City Railway Company?

Answer. The Des Moines Street Railroad Company.

Cross-int. 9. What was this Des Moines Street Railroad Company?

Answer. The Des Moines Street Railroad Company was the company that acquired the Street Railway Company, the Des Moines Broad Gauge, the Des Moines Electric and the Des Moines Sevastopol.

Cross-int. 10. The Des Moines Street Railroad Company in acquiring those rights, did you acquire all the corporate stock of each company?

Answer. No, sir.

Cross-int. 11. What did you acquire?

Answer. We acquired the corporate stock of the Des Moines Street Railroad Company, and acquired the property rights and privileges of the other companies.

Cross-int. 12. You acquired the franchises and privileges of the Des Moines Broad Gauge Street Railway Company and the Des Moines Electric Street Railway Company and the Des Moines
2567 Sevastopol Street Railway Company?

Answer. Yes, sir.

Cross-int. 13. When was the Des Moines City Railway Company organized?

Answer. In July, 1893.

Cross-int. 14. When the Des Moines City Railway Company was organized did the Des Moines City Railway Company buy the corporate stock of the Des Moines Street Railway Company?

Answer. Yes, sir.

Cross-int. 15. They acquired all the stock?

Answer. All of the stock of the companies that were consolidated and went in to make up the Des Moines City Railway Company; yes, sir.

Cross-int. 16. Mr. Hippee, does the Des Moines City Railway Company own all the corporate stock in the Des Moines Street Railroad Company?

Answer. No; in the re-organization the individuals that owned the stock in the Des Moines Street Railroad Company exchanged their shares of stock, share and share alike, for shares in the Des Moines City Railway Company.

Cross-int. 17. Well, then the corporation known as the Des Moines Street Railroad Company is not now out of existence?

Answer. Yes; it is in existence.

Cross-int. 18. Is the corporation known as the Des Moines Street Railway Company now in existence?

Answer. Yes.

Cross-int. 19. Is the same true as to the Des Moines Broad Gauge Street Railway Company?

Answer. I don't know about that.

Cross-int. 20. How about the Des Moines Electric Street Railway Company?

2568 Answer. I can't answer that.

Cross-int. 21. The Des Moines Sevastopol Street Railroad Company?

Answer. I can't answer that.

Cross-int. 22. The Des Moines Rapid Transit Street Railway Company?

Answer. The Des Moines Rapid Tran-it is alive, still existing.

Cross-int. 23. The Des Moines Suburban Railway Company?

Answer. That is alive and in existence.

Cross-int. 24. The Des Moines Belt Line Railway Company?

Answer. That is alive and in existence.

Cross-int. 25. The Des Moines River Line Street Railway Company?

Answer. That is alive and in existence.

Cross-int. 26. When did the Des Moines City Railway Company acquire the Des Moines Sevastopol Street Railway Company?

Answer. In 1889.

Cross-int. 27. Did the Des Moines Street Railway Company acquire the Des Moines Rapid Tran-it Company?

Answer. No, sir.

Cross-int. 28. Did the Des Moines Street Railroad Company acquire that?

Answer. No, sir.

Cross-int. 29. Did the Des Moines City Railway Company acquire that?

Answer. Yes, sir.

Cross-int. 30. When did they acquire that?

Answer. In July 1893.

Cross-int. 31. Did the Des Moines City Railway Company acquire the Des Moines Suburban Railway?

Answer. Yes, sir.

Cross-int. 32. Did the Des Moines City Railway Company acquire the Des Moines Belt Line Railway Company?

Answer. No.

2569 Cross-int. 33. What Company did acquire the Des Moines Belt Line Railway Company?

Answer. The Des Moines Suburban.

Cross-int. 34. Then The Des Moines Suburban Railway Company was afterwards sold to the Des Moines City Railway Company?

Answer. Yes.

Cross-int. 35. Now, the Des Moines Street Railroad Company, you say the stock in that company is owned by the Des Moines City Railway Company?

Answer. I don't know. I said the stock of the Des Moines Street Railway Company was exchanged share for share for stock in the Des Moines City Railway Company?

Cross-int. 36. The Des Moines Street Railroad Company as a corporation is still existing?

Answer. Yes, sir.

Cross-int. 37. Does the Des Moines Street Railroad Company conduct its business independently of the Des Moines City Railway Company?

Answer. What business?

Cross-int. 38. The corporation business of the Des Moines Street Railroad Company?

Answer. The Des Moines Street Railroad Company is kept alive.

Cross-int. 39. Does it transact its business in accordance with its charter and articles of incorporation?

Answer. I don't know whether I know how to answer that question.

Cross-int. 40. Does the Des Moines Street Railroad, the Des Moines Broad Gauge and all these other roads, as indicated on the key of Exhibit B, transact their business independent of the Des Moines City Railway Company, keep separate accounts?

Answer. No, sir.

2570 Cross-int. 41. Then all these different companies, except the Des Moines City Railway Company, they didn't keep an account of the income and expense of the different companies?

Answer. They did not.

Cross-int. 42. Then as I understand it, these different companies, all the rights that they have conveyed to the Des Moines City Railway Company, are merely in the nature of franchises and privileges and in the corporate stock?

Answer. The Des Moines City Railway Company has acquired the franchises and privileges of these different companies, property rights and franchises, yes.

Cross-int. 43. The green lines on Exhibit C indicate the tracks removed; what do you mean by that, Mr. Hippee, by tracks removed?

Answer. I mean that the green line, where it parallels either the red line or the yellow line, shows that that yellow line which represents the Broad Gauge Electric track, means that that track was taken out; and where it parallels the red line, means that that track was taken up and removed.

Cross-int. 44. Not replaced?

Answer. Not replaced in this period. I mean the period covered by the map.

Cross-int. 45. The black lines indicate tracks re-laid, what do you mean by that?

Answer. I mean, where the black line parallels the yellow line or red line, means in this period, as represented by this map, that that track was taken up and new track re-laid.

Cross-int. 46. Now the black ladder bar, or lines indicating extensions or new tracks, what do you mean by that?

Answer. I mean, where that ladder line is shown on the map, it means new pieces of track and principally laid in the

2571 period as shown on this map, to connect up the tracks of the different companies and make one common system, to bring them to a common center and system. That also shows where extensions were made and new track was laid where there had been no track before this time.

Cross-int. 47. Is this map made from a copy of a map on file in the office of the City Railway Company.

Answer. This map is made from a copy of track records that I have in my personal paper files of the City Railway Company, directly under my personal supervision.

Cross-int. 48. You helped to make this map?

Answer. I did.

Cross-int. 49. You spoke something about private right of way; is the Des Moines City Railway Company the owner of that private right of way?

Answer. Yes, sir.

Cross-int. 50. I think you said something in regard to Mr. Cummins giving an opinion that the Turner Franchise was perpetual, did I understand you correctly?

Answer. No, I didn't say that Governor Cummins gave an opinion, that we had a written opinion from him.

Cross-int. 51. What was that statement; what did he say in that conversation, who was the conversation with?

Answer. It was in this meeting in which the consolidation resolution was passed, before the City Council, in September, 1889. He was representing the City, along with the City Solicitor, and I said it was my opinion that both the City Solicitor and Governor Cummins agreed on the proposition that the franchise was perpetual.

2572 Cross-int. 52. Was that question put to Governor Cummins?

Answer. I don't think the question was asked directly, but it was put in this way: they asked a modification of the franchise; they wanted the Street Railroad Company to allow the City to prohibit tracks from being placed on every street. In the argument pro and con, the argument was used that the franchise was perpetual, if the city didn't have some such regulation, they would use every street. It was generally considered at that time it was a little dangerous to drive on the streets; the argument was used by Governor Cummins.

Cross-int. 53. Governor Cummins didn't say it was perpetual?

Answer. My best recollection is he said it was perpetual, and the City Solicitor said it was perpetual, and Judge Baylies said it was perpetual in that meeting.

Cross-int. 54. The tracks originally placed on the streets by the Narrow Gauge have all been removed, have they not?

Answer. Yes, sir.

Cross-int. 55. And new tracks replaced by the Complainant, the Des Moines City Railway Company?

Answer. New tracks were originally replaced for the Narrow Gauge tracks by the Des Moines Street Railroad Company?

Cross-int. 56. Have those tracks been replaced by the Des Moines City Railway Company?

Answer. Yes, sir, largely.

Cross-int. 57. Has the Des Moines City Railway Company relayed the tracks of the Broad Gauge and Electric Company lines?

Answer. No.

The further taking of testimony was here adjourned until 2 o'clock P. M. of this day.

2573 APRIL 18, 1906—2 o'clock P. M.

Pursuant to the adjournment the taking of testimony herein was resumed as follows:

G. B. HIPPEE, recalled for further cross-examination, examined by Mr. COHEN, testifies as follows:

Cross-int. 58. Are the rails which were laid by the Des Moines Belt Line Company still in use?

Answer. No, sir.

Cross-int. 59. Did the Des Moines City Railway Company re-lay those rails?

Answer. Yes, sir.

Cross-int. 60. Are the tracks in use which were laid by the Des Moines River Line Street Railway Company?

Answer. No, sir.

Cross-int. 61. Were they replaced by the Des Moines City Railway Company?

Answer. Yes, sir.

Cross-int. 62. How in respect to the Des Moines Sevastopol Street Railway Company?

Answer. Those rails were all replaced by the Des Moines Street Railroad Company.

Cross-int. 63. That is, after the Des Moines Street Railroad Company acquired the rights in the Des Moines Sevastopol Street Railway Company, they took up those tracks and re-laid new ones?

Answer. Yes.

Cross-int. 64. And the same is true as to the Des Moines Transit Railway Company?

2574 Answer. The Des Moines City Railway laid that tracks.

Cross-int. 65. And the Des Moines Suburban Railway?

Answer. The Des Moines City Railway laid that track.

Cross-int. 66. Was practically all the rails that was used by these different companies then relaid by either the Des Moines Street Railroad Company or the Des Moines City Railway Company?

Answer. All the rails have been relaid by either the Des Moines Street Railroad Company or the Des Moines City Railway Company.

Redirect examination by W. L. READ, Esq.:

Int. 1. Mr. Hippee, you have answered upon cross-examination with respect to the transfer by the various corporations of their respective corporate property rights and privileges acquired by grant from the City of Des Moines, and the final transfer from the Des Moines Street Railroad Company to the Des Moines City Railway Company; I will ask you to state whether these transfers were absolute or whether there was any trust reserved, whether the transfer

was as to the Street Railroad Company as trustee, or whether it was absolute?

Answer. It was absolute; no trust reserved.

Int. 2. You may state whether the Des Moines City Railway Company is the only Company that has been engaged in the operation of street railways in the City of Des Moines since the organization of that company and the taking over of the property and privileges of the other companies?

Answer. The Des Moines City is the only company that has been engaged since 1893.

2575 Int. 3. You have stated that the corporate organizations of some of the other companies have been kept up; you mean, you have attended the election of officers?

Answer. Yes, sir.

Int. 4. There has been no business transacted?

Answer. No business transacted.

Int. 5. Other than this the companies have no assets and no liabilities?

Answer. No liabilities and assets at all.

Int. 6. It is just a legal entity?

Answer. Yes, sir.

Int. 7. So far as the Des Moines Broad Gauge Company is concerned, the Des Moines Electric Railway Company and the Sevastopol upon consolidation, merely the property rights and the rights and privileges acquired from the City of Des Moines were transferred?

Answer. That is all.

Int. 8. What was one with these corporate organizations since that time?

Answer. I don't know.

Int. 9. Various inquiries have been made, Mr. Hippee, respecting the lines of street railway construction and removal of tracks; the facts with reference to all such matters are correctly shown on Exhibits A, B, C, D, E and F?

Answer. Yes, sir.

Int. 10. No statement of yours in response to questions on cross-examination can be understood as changing or altering the situation as portrayed and disclosed by those maps?

Answer. No, sir.

2576 Recross-examination by Mr. COHEN:

Cross-int. 1. As I understand it, Mr. Hippee, all these companies, except the Des Moines City Railway Company, all these companies indicated in the Key of Exhibit C, have no assets and no liabilities, except the Des Moines City Railway Company?

Answer. The only two companies that have operated street railways here in the City of Des Moines, and that have had assets in the respective periods in which they have operated, is the Des Moines Street Railroad Company and the Des Moines City Railway Company; the Des Moines Street Railroad Company was from October,

1889 to July 1893, and the City Railway is from July 1893, to the present time.

Cross-int. 2. At the present time the only company that has assets or liabilities, or both, is the Des Moines City Railway Company?

Answer. The Des Moines City Railway Company.

Re-redirect examination:

Int. 1. I think I recall there were some outstanding bonds—I don't know whether there are any outstanding bonds issued by any of the other companies?

Answer. Yes, sir; there is an outstanding bond issue by some of the other companies.

Int. 2. What provision is made?

Answer. Provision is made in the Des Moines City Deed and the bonds are held to retire those. A part of these bonds have been retired, that were issued by prior companies.

2577 Int. 3. There is, of course, that technical liability?

Answer. Yes, there is that bond issue out.

Complainant offers in evidence Exhibit 231, being a certified copy of the petition in the suit of the City of Des Moines against the Des Moines Street Railroad Company, to which reference was made in testimony, and being the suit referred to in testimony, brought to cancel the Truner franchise, being Equity, No. 1677.

—— ——.

Subscribed in my presence and sworn to before me by the said G. B. Hippee, this — day of —— 1906.

—— ——,

Examiner and Notary Public, Polk County, Iowa.

2578 WALTER MCCAIN, of lawful age, being duly sworn on the part of Complainants, Examined by W. L. READ, Esq., testified in chief, as follows:

Int. 1. Where do you reside?

Answer. In Des Moines.

Int. 2. How long have you lived in Des Moines?

Answer. Forty-eight years.

Int. 3. Are you the Walter McCain who was associated with Mr. F. A. Sherman and others in the purchase from Dr. M. P. Turner and his wife, of the Des Moines Street Railway Company and its tracks?

Answer. Yes, sir.

Int. 4. When was that purchase made, about when, what year?

Answer. In 1886.

Int. 5. You and your associates purchased all of the capital stock of the Des Moines Street Railway Company, did you not, from Turner and his wife?

Answer. Yes, sir.

Int. 6. And after the purchase you took over the management and operation of the railway system, did you?

Answer. Yes, sir.

Int. 7. In what capacity did you act, what was your official relation?

Answer. I was President.

Int. 8. Who was Secretary?

Answer. Mr. Sherman.

Int. 9. Who was in the active management?

Answer. Mr. Sherman and myself were in the active ones.

Int. 10. How long did you continue in the management?

Answer. About nearly four years.

2579 Int. 11. You continued until the consolidation took place?

Answer. Yes, sir.

Int. 12. In 1889?

Answer. Yes, sir.

Int. 13. Mr. McCain, since that time you have not been connected with the management of the Street Car Company?

Answer. No, sir.

Int. 14. What has been your business since that?

Answer. The real estate business and the cement business.

Int. 15. Now, at the time of the purchase of the Des Moines Street Railway Company, what if any representations and statements did Dr. M. P. Turner make with respect to the franchise which had been granted by the City of Des Moines being perpetual, with the exclusive feature expiring the 1st of January, 1898?

Objected to on the part of respondent as being immaterial, for the reason that any statement Dr. Turner may have made is not binding on the City of Des Moines.

Answer. Dr. Turner always made the assertion to us that the franchise was perpetual; we not only took his word for it—never did take his word for it, for that matter—without consulting attorneys; before we went very far in the matter of the purchase, we learned through attorneys by their opinion, it was perpetual.

Int. 16. Was Mr. B. F. Kauffman consulted with respect to that matter?

Answer. Yes, sir.

2580 Int. 17. What opinion did he give?

Objected to on the part of respondent as being immaterial.

Answer. He gave the opinion it was perpetual.

Int. 18. That was a verbal opinion?

Answer. That was a verbal opinion.

Int. 19. In financing the arrangement by which the Company was taken over, did you have anything to do with the Honorable John Sherman, Senator from Ohio?

Answer. Yes, sir.

Int. 20. Mr. F. A. Sherman, your associate, was a nephew of his?

Answer. Yes, sir.

Int. 21. The money or a part of the money to enable you to take over the railway company, or the stock, was obtained from or through the Honorable John Sherman, was it?

Answer. Yes, sir.

Int. 22. You may state whether or not he made the requirement as a condition of furnishing the money, that the opinion of an attorney should be obtained with respect to the perpetual character of the Turner Franchise?

Answer. Yes, sir; he did.

Int. 23. Had you and your associates represented to him that it was perpetual, in your applications?

Answer. Yes, sir; we did.

Int. 24. Did he require there should be the opinion of an attorney furnished?

Answer. Yes, sir.

Int. 25. Was such an opinion obtained?

Answer. There was.

2581 Int. 26. From whom?

Objected to on the part of respondent as being immaterial.

Answer. From Mr. Parsons.

Int. 27. Mr. Galusha Parsons?

Answer. Yes, sir.

Int. 28. He was then a practicing attorney in the City of Des Moines?

Answer. Yes, sir.

Int. 29. Was that in writing?

Answer. That was in writing.

Int. 30. You may state whether or not Mr. J. S. Polk gave his written statement, concurring in that opinion also?

Objected to on the part of respondent as being immaterial.

Answer. He did.

Int. 31. You may state whether that opinion of Mr. Parsons, with the concurrent opinion of Mr. Polk was furnished to the Hon. John Sherman?

Answer. Yes, sir.

Int. 32. Do you know whether or not Mr. Sherman took the advice of other counsel upon the same subject?

Answer. Only from hear-say.

Int. 33. What is your information from that source?

Objected to on the part of respondent as being immaterial, incompetent and hear-say.

Answer. Senator Foraker, of Ohio, was the attorney representing Mr. Sherman, and also Mr. Wybord, and I was told by Frank Sherman that they had had an opinion from Mr. Foraker that the franchise was perpetual.

2582 Int. 34. Was Mr. Wybord also an attorney?

Answer. No, sir.

Int. 35. Was he an associate of yours and Mr. F. A. Sherman in taking over the property?

Answer. Well, he was one of the gentlemen who put in money afterwards.

Int. 36. Mr. Wybord was a relative of Mr. Sherman?

Answer. Yes, sir.

Int. 37. What relation was he?

Answer. A brother-in-law.

Int. 38. Mr. McCain, I wish you would state what understanding and belief you and your associates had at the time of the purchase of the Turner stock and the railway company property with respect to the Turner franchise being perpetual?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. We never believed or thought of anything else but that it was perpetual, and if we had had any other thought about it, we never would have touched the property.

Respondent moves to strike the answer as being not responsive.

Int. 39. Did you rely upon your understanding and belief that the franchise was perpetual in making the purchase?

Answer. Altogether.

Int. 4. Did your associates so rely upon it?

Answer. Altogether.

Int. 41. Up to that time, at least, had you ever heard it questioned, but that the Turner franchise was perpetual?

Objected to on the part of respondent as being immaterial.

Answer. No, sir; never did; never heard of it being objected to.

2583 Int. 42. Can you say whether or not it was the general common understanding and belief in the City of Des Moines, and by the officers and representatives of the City, that the franchise was perpetual?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. It was generally so thought.

Int. 43. The deal with Turner was finally consummated and you took over the stock of the Company and its management?

Answer. Yes, sir.

Int. 44. Do you recall, Mr. McCain, that along after you had thus bought the property, that the City Council granted some other street railroad privilege to some other company?

Answer. Yes, sir.

Int. 45. Did that other company construct some lines of railway?

Answer. Yes, sir.

Int. 46. Was there any conflict or controversies between the company which you was representing and managing and that other company?

Objected to on the part of respondent as being immaterial.

Answer. There was.

Int. 47. Respecting what, Mr. McCain, I wish you would give us, not in detail, but generally a view of the situation which prevailed

in the City of Des Moines with respect to the street railway question from that time on up until the consolidation?

Objected to on the part of respondent as being immaterial, irrelevant and incompetent.

2584 Answer. From the very commencement of the City granting to the Broad Gauge road, at that time, there was strife and trouble all the time, both day and night, wherever the Broad Gauge would start their building, especially those we had our tracks on, there was a fight all the time. I personally stood on Sixth Avenue one day from seven o'clock in the morning until eight at night, with my foot on the rail, and Mr. Teachout and Van Ginkle coming up on the street with their rails. I was told they didn't dare lay their hands on me; was threatened with arrest. I stayed there all day long and kept them from coming up the hill.

Int. 48. What was the trouble?

Answer. To keep them from going up the hill.

Int. 49. On the same street?

Answer. On the same street, Sixth Avenue.

Int. 50. Can you recall some other instances?

Answer. Over along on the Grand Avenue bridge, at the time they granted the Broad Gauge the right to cross Grand Avenue bridge, they jumped in there to put in their tracks. On that day Mr. Sherman, Mr. Grefe and myself were arrested, one after the other and taken before the police judge; I think I was arrested seven times that day.

Int. 51. In one day.

Answer. In one day.

Int. 52. Were the people on the other side arrested?

Answer. No, sir.

Int. 53. The City was granting all kinds of concessions to the other Company?

Answer. Yes, sir.

Int. 54. And interfering, as you thought, with your rights and privileges?

Answer. All the time.

2585 Int. 55. I assume that your activity was to secure and preserve the situation so as to enable your system to develope and operate?

Answer. Yes, sir.

Int. 56. You had a mix-up on the east side too?

Answer. Yes, sir, several of them.

Int. 57. Can you tell us generally what they were?

Answer. On East Fifth & Locust, I think it was, where they were attempting to build tracks; we had our gang of men there; it very nearly developed into a riot at that time. Both companies, I think, at that time were estopped from doing anything by the City Council; I think it was shortly after that that the talk of consolidation commenced.

Int. 58. Now, this kept up how long, during what period?

Answer. O, for a year and a half.

Int. 59. Upon some streets, for a short distance, there were a good many tracks put down?

Answer. Yes, sir.

Int. 60. How many do you recall, the most in one place?

Answer. I think there were three tracks on Fourth Street, on west Fourth Street.

Int. 61. Wasn't there some places on the east side where there were three or four or more?

Answer. Yes, sir; I can't recall which street on the east side, but there were three tracks—there were four tracks; one track was laid right on the ground; it wasn't attempted to be put down.

Int. 62. What street was that?

Answer. I can't recall what street it was. The ties were laid right on top of the ground; no pretense of putting it down right.

2586 Int. 63. Wasn't that on east Locust, between Fifth & Sixth?

Answer. It is my opinion that was on east Locust. It is my recollection that most of our trouble on the east side was on east Fifth & Locust.

Respondent moves to strike the answer as not being responsive.

Int. 64. Was there any space left for another track on that street?

Answer. No sir: there wasn't.

Int. 65. Did it ever occur that one or the other company would go out in the silent hours of night and spike in a track?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir.

Int. 66. In the hours of darkness?

Answer. It did occur.

Int. 67. More than once?

Answer. Right on this street, west Fifth, I recollect well, that we were in here all night long during a heavy storm.

Int. 68. Did the other company resort to the same things?

Answer. Yes, sir; they attempted the same thing on the same street; we were a little ahead of them.

Int. 69. Were the rival tracks ever torn up or displaced by the other side in carrying on this work?

Answer. No, not that I ever recollect of.

Int. 70. You had, I suppose wordy wars and altercations, did you?

Answer. Yes, sir, all the time.

Int. 71. With the management and workmen?

Answer. Yes sir.

Int. 72. And the representatives of the City Government were involved too, wer-n't they?

2587 Objected to on the part of respondent as being immaterial.

Answer. Yes, sir.

Int. 73. The relations between the two companies were hostile?

Answer. All the time. yes, sir.

Int. 74. No exchange of transfers?

Answer. Not a bit.

Int. 74. No relations of accommodation whatever?

Answer. Nothing at all of the kind.

Int. 75. Rivalry and jealousy and controversy during that period?

Answer. Yes, sir.

Int. 76. During that period, Mr. McCain, do you recall that the City Council passed a good many resolutions and adopted a good many ordinances conferring privileges and rights to the Broad Gauge Company?

Answer. Yes, sir.

Int. 77. And fulminated against your company by resolutions, motion ordinances of various kinds?

Answer. Yes, sir.

Int. 78. Do you recall whether or not the rights of your company were very much discussed, both by the public and the City Council and members of the City Government, in the newspapers at that time?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. Yes, sir.

Int. 79. Do you recall that the City Council had by and through a committee evolved a series of resolutions by which it was made to appear that your company had failed to perform its duties to the public, its conditions expressed and implied of the ordinance,
2588 and it finally culminated in the bringing of a suit by the City against your company to cancel the charter?

Answer. Yes, sir.

Int. 80. Do you recall whether or not the firm of Cummins & Wright were employed by the City in that litigation?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. Yes, sir.

Int. 81. The Mr. Cummins who was a member of that firm, is the Hon. A. B. Cummins, now Governor of the State?

Answer. Yes, sir.

Int. 82. Do you recall that there was litigation between your Company and the Broad Gauge Company and the City, growing out of these grants?

Answer. Yes, sir.

Int. 83. The Des Moines Street Railway Company brought suit against the Broad Gauge Company, did it not, on account of the alleged interference with its rights on certain streets, or all the streets?

Answer. Yes, sir.

Int. 84. That was predicated on the claim of an exclusive grant for a period?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir.

Int. 85. Do you recall that that litigation finally went to the Supreme Court?

Answer. Yes, sir; it did.

Int. 86. Do you recall also, if so, state, that as a result of the suit of Teachout against the Broad Gauge Company, it was determined that the exclusive feature of the Turner franchise was limited
2589 to the exclusive right to operate street cars in the City by horse power only?

Objected to on the part of respondent as being immaterial, incompetent and not the best evidence.

Answer. Yes, sir.

Int. 87. Now, Mr. McCain, during that period, I referred to, the period from the time the Broad Gauge Company began its operations up to the period just prior to the consolidation the period during which these rivalries were manifested, had you ever heard any statement made to the effect that the Turner franchise was other than perpetual?

Objected to on the part of respondent as being immaterial, incompetent and hear-say.

Answer. No, sir, I never heard of it.

Int. 88. Had you during that period attended meetings of the City Council at which action was taken with respect to either one of the companies, I mean the Des Moines Street Railroad or the Broad Gauge Company?

Answer. Yes, sir.

Int. 89. Was any statement or claim ever made at such meetings by any number of the City Council, by the Mayor or by the local representatives of the City, or by any one else, to the effect that the Turner franchise was not perpetual?

Objected to on the part of respondent as being immaterial and incompetent.

Answer. Not to my recollection; I never heard any one of them mention it.

Int. 90. You never heard any statement to that effect?

Answer. No, sir.

Int. 91. During that same period, Mr. McCain, during the period of the controversy between the two companies, did the repre-
2590 sentatives of the Broad Gauge Company ever claim or make any statement to the effect that the Turner franchise was not perpetual?

Objected to on the part of respondent as being immaterial.

Answer. No, sir, not in my hearing.

Int. 92. Were you familiar with the briefs and arguments filed in these cases?

Answer. I was at the time.

Int. 93. Do you recall whether or not any statement was contained in the brief filed by Mr. J. H. Dietrick, then the City solicitor, and

Judge Baylies, wherein the statement was made that the franchise was perpetual?

Objected to on the part of respondent as being immaterial, incompetent and not the best evidence.

Answer. I don't recall that.

Int. 94. Mr. McCain, do you recall the fact that there was a consolidation of the rival companies in the City?

Answer. Yes, sir.

Int. 94½. Did you attend and take part in any of the negotiations touching that matter?

Answer. I did.

Int. 95. I wish to inquire, Mr. McCain, what the feeling and sentiment was in the City, on the part of the City Government and its officers with respect to this street railway warfare, which had been in progress?

Objected to on the part of respondent as being immaterial and irrelevant.

Answer. Most every one in the City outside of those directly interested in the Broad Gauge road was of the opinion there should be but one road here.

2591 Respondent moves to strike the answer as not responsive.

Int. 96. Can you state whether or not there was developed a sentiment in favor of a consolidation of the railway system and its management by one concern?

Objected to on the part of respondent as being immaterial.

Answer. There was a very strong sentiment.

Int. 97. Had you been spoken to by people along that line, to that effect?

Answer. A great many times; yes, sir.

Int. 97½. Had the matter been mentioned by representatives of the City, city officers?

Answer. Yes, sir.

Int. 98. You say you recall there was a consolidation?

Answer. There was.

Int. 99. Can you state what gave rise to the movement that terminated in consolidation?

Answer. I think it was more on account of the sentiment of the people of the City of Des Moines and the heads of the City Department, the Mayor, especially. I remember he talked with us, came to our office, talked with us as to the advisability of this consolidation; he wanted to get over this trouble; W. L. Carpenter was Mayor at the time. I think it was through the wishes more of the people generally; they wanted the thing to develope into a consolidation. I want to further state, that we had some talk with the Broad Gauge people at the time, Mr. Baylies, who was then an attorney, looking towards consolidation, putting the two properties together.

2592 Int. 100. Then the matter was taken up and became a subject of negotiation later on?

Answer. Yes, sir.

Int. 101. How long was the matter up before it was finally settled, Mr. McCain, do you know?

Respondent makes same objection as last above.

Answer. I think it was six months.

Int. 102. Who, Mr. McCain, finally undertook the task of consolidation?

Answer. Mr. Polk.

Int. 103. Mr. J. S. Polk?

Answer. Mr. J. S. Polk.

Int. 104. Do you know, Mr. McCain, what steps Mr. Polk took in order to bring about the desired end of consolidation?

Answer. I don't know as I can state.

Int. 105. Do you know whether he took options or not, on the different properties?

Answer. Yes, sir.

Int. 106. Did he take an option on your property?

Answer. I think he had an option on our property.

Int. 107. That was the general condition?

Answer. Yes, sir.

Respondent moves to strike the answer of the witness, for the reason that he has not shown himself competent to testify as to these facts.

Int. 108. Was you present at the meeting of the City Council which culminated in the adoption by the City Council of what are called the consolidation resolutions?

Answer. Yes, sir.

Int. 109. Do you recall that Governor Cummins was present at that meeting, representing the City?

Answer. Yes, sir.

2593 Int. 110. Mr. Carpenter?

Answer. Yes, sir.

Int. 111. Mr. James H. Dietrick? City Solicitor?

Answer. Yes, sir.

Int. 112. Was Mr. B. F. Kauffman there?

Answer. Yes, sir.

Int. 113. Mr. Polk?

Answer. Yes, sir.

Int. 114. And Hippee?

Answer. Yes, sir.

Int. 114½. Was any demand made on behalf of the City for any concessions as a condition to the consolidation?

Answer. Yes, sir.

Int. 115. What were they, in a general way?

Answer. Respecting to laying of tracks on all the streets; I think the resolution was to the effect of using every other street for tracks.

Int. 116. I call your attention, Mr. McCain to the language of the resolution, adopted September 5, 1889; I first inquire, however, whether you heard the resolutions read and was familiar with them at the time?

Answer. Yes, sir; I was at the time.

Int. 117. Do you recall that there were two resolutions adopted at the same time?

Answer. No, sir; I don't recall that.

Int. 118. You may examine if you will, the resolutions which appear as sections 1339 and 1340 of the Revised Ordinance of the City of Des Moines for the year 1890?

(Witness examine- resolutions)

Int. 119. Do you recall that the matters which became the basis of the consolidation were embodied in two separate resolutions.

2594 Answer. Yes sir.

Int. 120. Do you recall whether or not Mr. Polk, or those representing him had demanded that the right to operate by electricity be granted?

Answer. Yes, sir.

Int. 121. Do you recall that the first resolution did not contain the provision for the grant of that right?

Answer. Yes, sir.

Int. 122. Can you state whether the first resolution as it appears in the Revised Ordinances expressed and represented the demands of the City with respect to the concessions to be granted?

Answer. Yes, sir.

Int. 123. Can you state whether or not the second resolution expresses the demand of Mr. Polk and his representatives with respect to the electrical provision?

Answer. Yes, sir.

Int. 124. Do you recall whether or not that session of the City Council was protracted until a late hour?

Answer. Yes, sir.

Int. 125. How late?

Answer. I think twelve o'clock or later than that.

Int. 126. After the final action, do you recall whether or not Mr. Polk paid any money on any of his options?

Answer. No, sir; I do not recall that.

Int. 127. I will call your attention to the language of the resolution "And provided further that not more than two tracks shall be laid upon any street, and wherever tracks are laid they shall be laid so as to leave as much room on either side as practicable" and I will call your attention to the following language in the first reso-

2595 lution particularly: "Provided that the company owning or operating such consolidated road shall accept such modifications of existing franchises as will require it within a reasonable time, not exceeding twelve months, to so adjust its system of tracks that parallel streets shall not be occupied nearer than two blocks apart; nor shall any tracks now being operated be taken up unless by direction of the City Council." I desire to ask you if you remember the circumstances of the latter clause, to-wit: Nor shall any tracks now being operated be taken up unless by the permission of the City Council, how that came to be put in and by whom?

Answer. I think Mr. Polk——

Int. 128. Do you remember Mr. Leander Bolton being a member of the City Council?

Answer. Mr. Leander Bolton.

Int. 129. How about that?

Answer. I recollect that; yes, sir.

Int. 130. Do you know whether that was inserted in the original resolution?

Answer. Yes, sir.

Int. 131. Who had presented the original resolution, do you know; was it Governor Cummins?

Answer. I don't recollect that.

Int. 132. That was interlined, that suggestion and requirement, by Leander Bolton?

Answer. Yes, sir.

Int. 133. There was a track at that time on Locust Street?

Answer. Yes, sir.

Int. 134. Also on Walnut Street?

Answer. Yes, sir.

2596 Int. 135. If the resolution had gone through as it was it would require the removal of one or the other of the tracks?

Answer. Yes, sir.

Int. 136. The discussion continued, you say, until about 12 o'clock?

Answer. Yes, sir.

Int. 137. Do you recall what was the subject of the discussion; was it the concession to the City of the requirements of this resolution?

Answer. Partly so; yes, sir.

Int. 138. Partly on the other side?

Answer. Yes, sir.

Int. 139. Do you recall, Mr. McCain, whether anything was said in that discussion with respect to the Turner franchise being perpetual?

Objected to on the part of respondent as being immaterial, leading and incompetent.

Answer. During the session of the Council I don't recall whether anything was said.

Int. 140. Well, during the progress of the negotiations, was there anything said?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir.

Int. 141. To what effect, in substance?

Answer. During the evening, it was either before or after the session of the Council, I talked with Mr. Dietrick personally respecting it, and he gave me his ideas, there was no question in his mind, but what the Des Moines Street Railway Company's franchise was perpetual.

Respondent moves to strike the answer, for the reason that
2597 any concessions made by any members of the City of Des Moines Council, while not in session are not binding on the City of Des Moines, and no statement by Mr. Dietrick could be binding for the same reason.

Answer. No, sir; I did not.

Int. 142. During that meeting of the City Council or any other meeting of the City Council during the period of negotiations, or at any other time, did you ever hear any statement or claim made to the effect that the Turner franchise was not perpetual?

Objected to on the part of respondent as being immaterial.

Answer. No, sir; I did not.

Int. 143. Mr. Polk hesitated, did he not, about going into the enterprise?

Objected to on the part of respondent as being immaterial, and leading.

Answer. Yes, sir.

Int. 144. And can you state whether or not the representatives of the City, Mr. Cummins, Mayor Carpenter, or the representatives of the Broad Gauge Railroad Company urged him to go into the enterprise?

Objected to on the part of respondent as being immaterial.

Answer. Yes, sir.

Int. 145. One or both or all of them?

Answer. I know that the Mayor did; I know that Mr. Dietrick—I presume he did to Mr. Polk—he did to us; always urging it.

Int. 146. Are you able to state by what arguments these persons undertook to persuade Mr. Polk; was anything said in that connection about the Turner franchise going on forever, and that it would be a good enterprise?

2598

Answer. Yes, sir; Mr. Polk, when he first took hold of it to make the consolidation had said to us repeatedly, and I think Mr. Dietrick, that under no circumstances would he take hold of it unless he knew it was a perpetual franchise?

Int. 147. Let me call your attention to one thing, Mr. McCain, Mr. Polk was contending for a grant of the right to use electricity as a motive power?

Answer. Yes, sir.

Int. 148. Do you recall any statement or claim made by him with respect to not going into the enterprise, unless the consolidated company would have the right to use electricity?

Answer. O, yes.

Int. 149. Now then, do you recollect whether anything was said by him to the effect and in connection with arguments made concerning the Turner franchise, he wouldn't go into it unless the right to use electricity was also given, so he could use that and have the same rights with respect to that that he had under the Turner franchise?

Answer. Yes, sir; he made that statement to us.

Int. 150. That was the effect of his statement?

Answer. Yes, sir; I recollect the time. If Mr. Polk hadn't consolidated the properties it would have left me in a very bad condition. I had everything up I owned on earth to keep up things and property, and I was very uneasy at the time, that he couldn't take hold of it.

2599 Cross-examination by Mr. COHEN:

C.-int. 1. Mr. McCain, I think you stated that Mr. Kauffman had given an opinion that the franchise was perpetual?

Answer. Yes, sir.

C.-int. 2. To whom did he give that opinion?

Answer. He gave that to Mr. Sherman and myself.

C.-int. 3. Did he give that to you at your request?

Answer. Yes, sir.

C.-int. 4. And you called at his office?

Answer. I don't know whether it was in his office or our's.

C.-int. 5. Did you call him over to your office for that purpose?

Answer. I don't know whether we did or not.

C.-int. 6. I think you stated that you didn't look the matter up, that you just asked him that question and he gave you his opinion?

Answer. After he had looked it up.

C.-int. 7. In your presence?

Answer. O, no, not in our presence.

C.-int. 8. Did you get his opinion on the day or at the time you requested him to give it?

Answer. I think not.

C.-int. 9. How long after.

Answer. I couldn't tell exactly how long after.

C.-int. 10. It might have been some days?

Answer. It might have been a week or so.

C.-int. 11. You say he gave you a written opinion?

Answer. No, sir, his opinion was verbal.

C.-int. 12. Who was it gave you a written opinion?

Answer. Mr. Galusha Parsons.

C.-int. 13. You asked him for that opinion?

2600 Answer. Yes, sir.

C.-int. 14. Was that before you requested an opinion from Mr. Kauffman?

Answer. No, sir, it was afterwards.

C.-int. 15. These statements in regard to the perpetuity of the franchise was made by Mr. Polk to you in whose presence?

Answer. You mean, the indorsement that he made?

C.-int. 16. No, this argument that you seem to have had pro and con in regard to this Turner franchise?

Answer. I don't know as it was made in the presence of anybody excepting Sherman and myself.

C.-int. 17. I think you said that you were at that time very deeply interested in the consolidation of the roads, and also of the deal that Mr. Polk had on at the time being concummated?

Answer. Yes; I was interested in it.

C.-int. 18. To such an extent that it would probably have financially embarassed you, if it hadn't gone through.

Answer. Yes, it would have hurt me somewhat, through the work of the City Council, and the granting of the franchise to the Broad Gauge, is what made the trouble for me.

(Signed) WALTER McCAIN.

Subscribed in my presence and sworn to before me by the said Walter McCain this 13th day of September, 1906.

[SEAL.] (Signed) J. P. BLAISE,
Notary Public, Polk County, Iowa.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

2601 J. S. POLK sworn on behalf of plaintiff testified as follows:

1 Q. Your name is J. S. Polk?
A. Yes sir.

2 Q. For some time prior to Sept. 5, 1889 what had been the condition of affairs in the city of Des Moines as to controversies between the various street railways?

A. Prior to Sept. 5, 1889 the City of Des Moines was in the midst of a bitter street railway war. There were eight street railways grasping for territory, and the possession of streets. Street fights and practically mobs resulting from such conditions had been of frequent occurrence.

3 Q. What consequences ensued from the rivalry between the various companies and especially between the Broad Gauge or Electric Company and the Narrow Gauge or Des Moines Street Railroad Company?

A. In their efforts to occupy streets which they regarded as of strategic importance the rival companies had torn up the streets endeavoring in places to place three or four tracks upon a single street and rendering the streets in many places dangerous and almost impassable for public travel. The officers of the city were in continual hot water in their efforts to keep peace between the rival factions and to guard against outbreaks.

4 Q. What were the consequences so far as the Mayor and the council were concerned?

A. The Mayor and council had frequent meetings, and heated discussions arising out of the importunities of the various companies for franchise rights, and their claims for the protection of the rights of each of them under the various and conflicting charters. For quite a while the attention of the council and city officers was almost entirely diverted from the consideration of the general business and affairs of the City.

5 Q. What was the character of the service which was furnished the public by the various street railways that were being operated?

A. In consequence of the conditions to which I have re-
2602 ferred street railway service was necessarily more or less broken up or disturbed. Moreover the lines that were operated were operated by independent companies and there was no physical connection between them. No transfers were issued from one line to another and the various lines did not in their management attempt to conform to the general system which would facilitate their use in connection with each other.

6 Q. What was the character of the construction of the tracks and the rolling stock?

A. The cars were small and of inferior construction. The tracks were insufficient, inferior rails being laid and the tracks being roughly and poorly ballasted so that transit from one part of the city to another over the lines was very rough the time was uncertain and the general conditions were unsatisfactory to the public using the lines.

7 Q. How many street railroads were there at the time in question in the city of Des Moines and adjoining towns?

A. There were at least eight different street railroad companies which either had built or were operating their lines or were proposing to build them in this territory.

8 Q. How many incorporated cities and towns were there then embraced in the territory which now forms the City of Des Moines?

A. At least nine, viz: City of Des Moines, and the towns of Greenwood park, University Place, North Des Moines, Capital Park, Easton Place, Grant Park, Gilbertville and Sevastopol.

The City of Des Moines and these towns, except the town of Gilbertville are designated with their boundaries upon the map entitled "Map of Des Moines showing all street railroads built up to 1889 and marked exhibit "B."

9 Q. What territory was embraced in the City of Des Moines on Sept. 5, 1889?

A. The territory was sections 2, 3, 4, 5, 8, 9, 10, and 11, township 78, range 24. This appears in the revised ordinances of
2603 1900, heretofore offered in evidence at page 9. The boundaries of this territory are indicated upon the map just referred to by black lines marked thereon "Corporation lines from March 7, 1857 to July 15, 1890." The territory embraced in the city of Des Moines was enlarged so as to include all of the territory upon the said map enclosed in the black lines marked "Corporation line July 15, 1890 after consolidation." A specific description of this territory is found on page 45 of the revised ordinances of the City of Des Moines of 1900 that have already been introduced in evidence.

10 Q. What were the rates of fare fixed upon the various street railroads in operation in the city of Des Moines prior to Sept. 5 1889?

A. The rate of fare which each road was authorized to charge was five cents except that one line was authorized to charge six cents. No single line covered the city, and as has already been stated there was no physical connection between the various lines.

11 Q. What was the gauge of the tracks of the Des Moines Street Railroad Company at the time referred to viz: Sept. 5, 1889?

A. At that time and until the consolidation of the roads in question, the tracks of this street railroad had a three foot gauge.

12 Q. If the tracks of the Des Moines Street Railway Company are shown upon the map already referred to and marked Exhibit "B" please state how they are there shown?

A. They are shown in the colors indicated by the key to this map opposite the words "Des Moines Street R. R. Co." I take to be light red.

13 Q. What was the character of the construction of these lines and how were they operated?

A. The lines were poorly constructed, light rail; the cars were small, narrow and uncomfortable; horses and mules were the motive power; the cars were run without conductors, the fares being
2604 collected by drivers with the aid of fare boxes.

14 Q. At that time, upon what streets was the Des Moines Electric Railway Company operating?

A. Upon the streets indicated on the map just referred to Exhibit "B" in yellow, it being the tracks indicated in the key as Des Moines Broad Gauge St. Ry. Co. and Des Moines Electric St. Ry. Co.

15 Q. What was the character of the construction and equipment of this line?

A. It was among the first if not the very first street railway in the United States to use electricity as its motive power. This power was then in an experimental stage. The construction was imperfect and poor. The rails were light. The cars were small and cheap, the motion was rough and unsteady.

The power plant was inadequate to furnish the power requisite for the proper operation of the system and the machinery was crude and imperfect so that the supply of power was insufficient uncertain and unreliable.

16 Q. Where was the line of the Des Moines and Sevastopol Street Railway Company?

A. It occupied the streets in South Des Moines and Sevastopol indicated upon the said map Exhibit "B" by the color indicated in the key which I take to be dark purple.

17 Q. What was the character of the construction of the road and and of the service rendered by it?

A. It was of light inferior construction and the tracks were very rough. The cars were small propelled by one or more horses, with a driver only, without a conductors. The fare which was five cents was collected by the driver and the cars ran at infrequent intervals, and the service furnished was very poor. As will be seen the terminus at the north end of the line toward the business part of the City of Des Moines was separated from the business part of
2605 the City by a large number of steam railroad tracks which it was necessary to cross at grade.

18 Q. Where was the business center of the City of Des Moines then and where is it now?

A. At the time in question the business center of the city of Des Moines was approximately at the corner of west Fourth and Walnut Streets. Now it is approximately at the corner of West Sixth and Walnut Streets.

The center of the business district in East Des Moines at the time in question was approximately East Fifth and Walnut Streets, and is now approximately east Sixth and Locust Street.

19 Q. Where were the railways of the Des Moines Belt Line Railway Company and the Des Moines River Line Street Railway Company located on and prior to Sept. 5, 1889.

A. These lines constituted a line extending from near the City

hall at or near west Second and Locust street to Highland park in North Des Moines, and are shown on the said map exhibit "B" in blue lines as indicated on the key to said map.

20 Q. What was the character of the construction of this line and of the service?

A. The line was built of light material insufficient for the service required of it and was cheaply built having many grades and sharp curves. The tracks were rough and there was a great deal of side motion to cars. The service was unsatisfactory, the cars running infrequently not as a rule on time. They were propelled by small steam motors. The fare was five cents and there were conductors upon the cars to collect it.

21 Q. Where were the tracks of the Des Moines Rapid Transit Railway Company located?

A. They were located largely upon private right of way owned by the Company upon what is now known as Ingersoll Avenue, and extended from the Intersection of 17th street and west Grand
2606 Avenue west to Greenwood Park.

They are shown on the plat in orange if I have the color correct, the color designated in the key to the map exhibit "B" already referred to.

22 Q. How was this road operated and what was the character of its construction and equipment?

A. The road was operated by steam as a motive power and at one time by a gasoline motor. The track construction and the rails were too light for the service. The cars were well built for the time but were small and at times rendered very uncomfortable by smoke and cinders from the engines. The cars ran infrequently and had difficulty in making their time so that the service was unsatisfactory. There was frequently trouble in operating the gasoline motor. The fare was five cents and was collected by a conductor.

23 Q. What was the Suburban Railway, what was the character of its construction, equipment and the service?

2607 A. The Suburban Railway at the time in question was operating a line on East Walnut Street from its intersection with East 20th Street to the State Fair ground, which is shown on the map in question in what I take to be dark red, by the color indicated in the key to the map.

The construction was insufficient, the rails being too light and the general track construction being too light. The cars were small and were propelled by steam motors running every half hour. There was more or less difficulty on account of inconvenience to the passengers due to smoke and cinders from the engines. There was no connection with any other road. The nearest point to any other street railroad that was being operated regularly was distant several blocks.

24 Q. Please explain the difficulties in getting from one street railroad to another at that time or across the city by street railway?

A. As an illustration if a person wished to go from the Fair ground to Greenwood Park, that is across the city from east to west, he would be required to take the Suburban Railway car at the Fair Ground which would take him to the west end of the road at East

20th Street for a five cent fare. From here he would have to walk to the Des Moines Street Railroad at 16th Street and Grand Avenue, a distance of several blocks. He could ride from there to West 12th Street and Grand Avenue, but I think there was no through car, and no transfers were given and that this would have cost him ten cents or two fares; from West 12th Street he would have been required to walk to west 17th Street some five blocks, and from there he could go on the cars of the Rapid Transit Co. to Greenwood Park for an additional five cent fare.

No two lines were run with reference to each other so that whether close connections were made or not was purely a matter of accident.

2608 Under these circumstances a trip across the city might take perhaps two or three hours, and I think could not have been made in less than two hours and the fare would have been fifteen or twenty cents, and in addition to the time and money the passenger would have — required to walk at one place a distance of four or five blocks between cars. The electric line shown in yellow on East Grand Avenue to the Fair Ground was operated east of 16th Street only during State Fair.

An examination of the map already referred to as Exhibit "B" will show that in a majority of instances a trip across the city would involve the use of several lines, transfers on foot, and would be slow, expensive and aggravating.

25 Q. What litigation had there been, growing out of the street car situation, and what litigation, if any, was then pending? State fully.

A. There had been litigation between the Des Moines Street Railroad Company and the Broad Gauge Company and between the Des Moines Street Railroad Company and the city of Des Moines, growing out of the grant by the City of street railroad rights to the Broad Gauge Company and from the attempt of the city to interfere with the rights or assumed rights of the Des Moines Street Railroad Company. This litigation, however, had terminated and resulted in the decisions of the Supreme Court, which have been referred to and introduced in testimony, by which it was determined, among other things, that the franchise of the Des Moines Street Railroad Company was valid, but that the exclusive feature of the franchise was for the operation of street railway by animals as a motive power.

This decision had been followed by a grant to the Broad Gauge Company or to the Electric Street Railway Company of the right to operate by electricity as a motive power, and its lines, or some of them, were equipped and were being operated by electricity. The use of electricity as a motive power for the operation of street railways was then in its infancy, and was experimental. About the same

2609 time, or shortly before, a line had been equipped by electricity in Richmond, Virginia, and the equipment in Des Moines was the *second* in the United States. Each of the railroad companies was a menace to the other, and interfered with the development and expansion of the railway system in the city and the rivalry and failure to act in harmony, interfered with and prevented rendering an efficient service to the city and citizens.

There was also then pending, and which had not been disposed of,

a suit brought by the Des Moines Street Railroad Company against the City of Des Moines to recover damages for the breach by the city of the Turner franchise and the contract evidenced thereby. The city had also brought and there was then pending a suit to cancel and declare null and void the Turner franchise, because of the alleged failure to comply with the conditions, expressed and implied of such franchise. James H. Deitrick was at that time city solicitor of the city of Des Moines, and in the suit last referred to, the firm of Cummins & Wright, of which the Hon. A. B. Cummins, now Governor of the State was a member, appeared as attorney for the city with Mr. Deitrick. Mr. Cummins was also the personal counsel and advisor of the City and of the Mayor in and about the consolidation proceedings.

26 Q. What sentiment and feeling had developed, and was expressed in the City of Des Moines by citizens and by members of the City Council, and the officers of the city prior to Sept. 5, 1889, relative to the Street Railroad situation in the City?

A. There was a strong feeling of dissatisfaction with the situation and with the conflict, controversies and rivalries growing out of the activity of the two companies. This feeling had culminated in a strong and growing desire for a better street car service. This
2610 sentiment found expression in newspapers, in public speeches, in expressions of the city council and of the individual members of the council and officers of the city, and in declarations of the citizens generally.

27 Q. What if any appeals were made to you, to undertake to relieve the situation?

A. I was interested in two street railways which were then being operated in the City, to-wit: The Rapid Transit and Suburban Companies. Number of citizens, and also the Mayor and members of the City Council requested, and strongly and persistently urged me, on account of this interest to take h'd of the street railway situation in the city and to secure by purchase or otherwise the consolidation of the several street railways in the city, with a view to connecting them and making one system out of them, and of widening the narrow gauge road, so that they might be operated as one system under a single management.

28 Q. What did you do in response to such solicitations?

A. I finally promised the City Council to make an effort to bring about a consolidation of the various companies, and to that end entered into negotiations with the Des Moines Street Railroad Company, the Des Moines Electric Railway Company and the Des Moines & Sevastopol Railway Company, which resulted in an arrangement by which myself and associates were given the right to acquire an interest in the Des Moines Street Railroad Company and by which it acquired options upon the property of the Electric Company and the Sevastopol Company.

29 Q. At the time you were solicited by the Citizens and the Mayor and City Council to undertake a consolidation of the several street railways of the City, as you have stated, what knowledge and information did you have with respect to the Turner franchise, its provisions, the character of the franchise with respect to its being

perpetual, the opinions of attorneys with respect thereto and the opinions of the representatives of the city, and of the Mayor and
2611 the City Council in that respect. State fully.

A. I was familiar with the Turner Franchise and knew that it had an exclusive grant that would not expire until January 1, 1898, and I knew further, that the general right granted by it was perpetual. I was not only familiar with the ordinance itself and the circumstances that had attended its enactment, I was also familiar with the opinion of Galusha Parson, that had been introduced in evidence, and I further knew that the construction that I had placed upon this ordinance with respect to the perpetual character of the franchise had been placed upon it by the City in the litigation with the Des Moines Street Railway Company, which had terminated before the transactions of which I am now referring. I also knew that this construction of the ordinance was entertained by Judge Baylies, who represented the Broad Gauge Railway Company and by Hon. A. B. Cummins, now the Governor of the State of Iowa, who was then the special counsel for the Mayor of the City, in the matter.

I also knew, and it is a fact, that in all of the controversies between the city and the Des Moines Street Railroad Company and Broad Gauge Company, which had culminated in the litigation between the city and the Des Moines Street Railroad Company and between the Des Moines Street Railroad Company and the Broad Gauge Company, and in the controversies and discussions that grew out of the street car situation in Des Moines, it had never been questioned but that the Turner franchise was perpetual except as to its exclusive feature, expiring January 1, 1898; no claim was ever made to the contrary. Judge Baylies, representing the Broad Gauge Company and James H. Deitrick, the City Solicitor, in a printed argu-
2612 ment filed in the Supreme Court, between the City, the Des Moines Street Railroad Company and the Broad Gauge Company, made statements to that effect which are introduced in evidence.

As stated, I was familiar with the accepted view with respect to the Turner franchise being perpetual and acted upon the assumption that it was perpetual, throughout the negotiations with the city, respecting the consolidation, and at all times afterward in the reconstruction and developement of the system.

30 Q. What if any requirements did you impose upon the city on behalf of yourself and associates as to the conditions upon which you would undertake the consolidation?

A. The Des Moines Electric Railway Company had a franchise granted by the City authorizing the use of electricity, but the franchise was limited in time and would expire twenty-five years from December 20, 1887. Throughout the negotiations and conferences with the representatives of the City, with respect to the consolidation, I had stated that I would not have anything to do with the matter, unless all questions as to the legality and validity of the Turner franchise were eliminated and removed by a settlement of the suit brought by the City to cancel and annul such franchise, to which I have already referred. And I also stated, that I would not

undertake it under a franchise for the use of electricity, that was not also perpetual.

31 Q. State what was said and done in the conference between you and your associates and the representatives of the City and of the other Railway Companies?

A. A number of conferences took place between us, and after it had been talked over, a meeting of the City Council was held at which I was present with my counsel and others interested
2613 with me and at which the *the* representatives of the Electric Railway Company and the Sevastopol Company were present and at which Mr. James Deitrick, the City Solicitor, and the Hon. A. B. Cummins associated with him and also the personal counsel of the Mayor were present. At this meeting there was a protracted and general discussion of the entire situation. The prices asked for the properties I regarded as high. To effect a consolidation required the expenditure of a large sum of money, and I hesitated to undertake the enterprise.

As before stated, the use of electricity as a motive power was new and largely experimental. While I have lived in Des Moines for a great number of years and knew it was a growing city, I was unable to believe that it would have the rapid growth which it did have and was doubtful as to the advisability of the enterprise, and from a financial point of view. The matter in its financial aspect was discussed in that meeting. The discussions were participated in by the representatives of the City and by the representatives of the other railroad interests and by myself and my representatives. The representatives of the City were urgent in their efforts to induce me to engage in the business. In the course of the discussion, it was stated by the representatives of the City—Mr. Cummins, Mr. Deitrick and others, in order to overcome my hesitation and to induce me to act, that while the prices might seem to be high, and the amount required, large, that nevertheless, I could *not* afford to undertake it as a financial ente-prise, for the reason and because the Turner franchise conferred and secured a perpetual right to use and occupy the streets of the city, and that with the advantages that would come from a consolidation of the railroads and from the growth of the City, it was a desirable financial enterprise.

The concession and demands proposed by the city were embodied in a resolution, which now appears as Sec. 1339 of the revised ordinances of the City of Des Moines of 1900, and which has
2614 been introduced in evidence.

It will be observed that according to this resolution, it was made a condition that the Company owning and operating the consolidated street railroads should accept such modification of existing franchises as to require it to adjust the system of tracks, so that parallel streets should not be occupied nearer than two blocks apart. And also further, that not more than two tracks might be laid upon any street, and still further, so modified that the city would have power to impose rules and requirements, relating to the construction and operation of the road. The Des Moines Street Railroad Company is not named or designated as the Company that would operate the system, if consolidated, but

it was assumed and understood by all parties that it was that Company was in contemplation, and it was understood that it was the Turner franchise, then owned by that Company, that it was required should be modified in the manner stated in the resolution, for the Turner franchise contained no restrictions as to occupying parallel streets, or as to the number of tracks that might be laid on any street, nor did the City have power under that contract franchise to impose rules and regulations as contemplated by the resolution.

In the course of the discussion at that council meeting, it was urged upon me, and my associates, in argument by its representatives that the concessions demanded should be acceded to, because and for the reason that the Turner franchise conferred a perpetual right to use and occupy the streets of the city without restriction, and consequently, that all of the streets might be occupied, leaving none for ordinary street use.

At that time the use of electric-y was new as a motive power, and the appliances being crude, electrical shocks had been sustained, especially by horses stepping on rails and also it was apprehended that the use of electr-y would frighten horses so as to seriously interfere — the use of streets occupied by street railways for purposes of travel by carriages.

2615 Mr. Cummins as well as other representatives of the city, strongly urged the necessity of the restriction, as to the right to use and occupy parallel streets, and the reasonableness of the demand for the concession was based upon the statement, that in as much, as the Turner franchise conferred a perpetual right the city as a condition of consenting to the consolidation, was entitled to the restrictions provided for by the resolution.

As above stated, the City had granted to the Des Moines Electric Railway Company, the right to use electricity as a motive power for a limited period. It was the purpose to electrify the entire system, and I had stated to the representatives of the City that I would not go into the matter, unless the right was conferred. I was not satisfied or willing to do so, under the limited right granted to the Electric Railway Company, and at the meeting stated to the representatives of the city that I required, not only that the suit brought to cancel the Turner franchise be settled so as to remove any question of the validity of that franchise, but also the right to use electricity as a motive power should be granted without limit as to time, so that such right should also be perpetual. Accordingly my demand with respect to the right to use electricity as a motive power was embodied in a second resolution, which now appears as Sec. 1340 of the revised ordinances of 1900, also introduced in evidence.

32 Q. What conclusion was finally reached?

A. After a session of the council, continuing until nearly midnight, I yielded to the requirements on behalf of the City, the City yielded to my requirements and the council passed the two resolutions to which I have referred, and they were approved and signed by the Mayor. As soon as this was done, I elected to purchase under the options which I held, and that night and before leaving the council room, paid the first $10,000 of the purchase price.

33 Q. Was the acceptance, which is dated Dec. 10, 1889,
2616 signed by the Des Moines Street Railroad Company and appearing as Section 1341 of the revised ordinances of the City of the revision of 1900, and introduced in evidence, an acceptance of these resolutions?

A. Yes.

34 Q. Had you at any time subsequent to the granting of the Turner franchise, or during the controversies between the rival street railways in the City of Des Moines, or during the negotiations which led to the consolidation, at the meeting of the City Council, to which you referred to, or at any time or place heard any statements or claim made by any one to the effect that the Turner ordinance, aside from its exclusive feature, was not perpetual?

A. I never at any time during that period, or until shortly before this suit was commenced heard any statement or claim made to the effect that the Turner ordinance was not perpetual.

35 Q. Was it assumed by you and your associates, and did you act upon the assumption throughout your negotiations relative to the consolidation and in making the purchases of the other Companies, and in effecting the consolidation, and the subsequent improvement and enlargement of the system, that the franchise was perpetual?

A. It was.

36 Q. If you and your associates had not believed that the Turner franchise was perpetual, would you have purchased and consolidated?

A. No.

37 Q. Were the provisions of the said two resolutions afterwards embodied in an ordinance adopted by the City?

2617 A. Yes. The ordinance is No. 492 passed March 8, 1890, and appears as Sections 1311, 1312, 1313, 1314 and 1315 of the revised ordinances of the City of Des Moines, revision of 1900, and has been introduced in evidence.

38 Q. Were the provisions of that ordinance accepted?

A. Yes.

39 Q. What was done thereafter pursuant to this arrangement and these resolutions?

A. The suit of the City of Des Moines referred to in the said resolution was dismissed and settled, and the suit of the Street Railroad against the City was dismissed and settled, an ordinance was passed March 8, 1890 which has already been introduced in evidence.

40 Q. What was done with reference to readjusting and reconstructing the property, so as to operate it as a single system?

A. The Des Moines Street Railroad Company took possession of the several properties conveyed to it and at once proceeded to widen out and rebuild the old narrow gauge tracks, making them standard gauge. It equipped all of the lines for operation by electricity, by poles and wires. It built a new power plant, at large expense. It built the track necessary to connect the several roads and removed the parallel tracks which became unnecessary, by

virtue of the consolidation and brought all the tracks to a common central place in the city of Des Moines, making out of the various roads a single homogeneous system.

The tracks were at once operated as a single system by electricity.

41 Q. What became of the Rapid Transit Company and the Belt Line Company and the Suburban Company?

A. Relations with those roads were established and they were largely rebuilt and re-equipped and were made parts of and
2618 operated in connection with the Des Moines Street Railroad Company as a part of a single system. The fare was made five cents for any one route and transfers were issued from one line to another, and the cars were run over the different lines in connection with each other so that passengers could get anywhere in the City for a single fare, so that the service was vastly improved, and the communication between the different parts of the City greatly facilitated.

42 Q. How much money did the Company expend in connection with this work?

A. Without going into details the amount expended doing the work in question and in extension from the 5th day of September 1889 until in 1893 when the transfer was made to the Des Moines City Railway Company, was approximately one and one half millions Dollars.

43 Q. What knowledge had the city and the city authorities of the improvements in question and of the extensions that were made from time to time?

A. The work was of a character that could not have been unknown and the city authorities had full knowledge of everything that was being done in the premises.

44 Q. What objection or protest to such work and extensions, if any, were made by the city authorities?

A. None whatever, on the contrary, they frequently asked for extensions, approved and encouraged them. They have assessed the Company for paving where tracks were laid upon paved streets, and sometimes required extensions to be made.

45 Q. State whether in connection with the arrangements made in 1889 for the consolidation of these properties the Des Moines Street Railroad Company issued any bonds which were sold to N. W. Harris & Company and if so, tell who conducted the negotiations with N. W. Harris & Co.?

2619 A. Such bonds were ed and were so sold and I conducted the negotiations.

46 Q. State what information was given to N. W. Harris & Co., as to the character of the Turner franchise in this connection?

A. They were furnished a copy of the ordinances of the City of Des Moines they were furnished the opinion of Galusha Parson, or a copy thereof, and their counsel also advised them that the ordinance was perpetual, and was so understood by the City authorities, and that it was exclusive until January 1, 1898.

(Signed) J. S. POLK.

Subscribed in my presence and sworn to before me by the said J. S. Polk this 19th day of April, 1906.

[SEAL.] (Signed) J. P. BLAISE,
Examiner and Notary Public in and for Polk County, Iowa.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

2620 DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

AUGUST 30, 1906—10 o'clock A. M.

Now, on this 30th day of August 1906, at 10 o'clock A. M. the further taking of testimony in the above entitled cause, was resumed as follows:

G. B. HIPTEE, being called for further cross-examination on the part of respondent, Examined by W. H. BAILY, Esq., testified as follows:

Cross-int. 1. What office did you occupy in the Des Moines Street Railway Company, in the time of the consolidation in the fall of 1889, down to the time of the sale to the Des Moines City Railway Company?

Answer. The consolidation was not in 1899.

Cross-int. 2. In 1889?

Answer. I was General Manager.

Cross-int. 3. And what office or place did you occupy in the Des Moines Sub-Urban Railway Company down to the time of the sale to the Des Moines City Railway Company?

Answer. I was General Manager of that and I think I was Secretary.

Cross-int. 4. And you have been General Manager of the Des Moines City Railway Company ever since it acquired the system?

Answer. Yes, sir.

Cross-int. 5. What office or place do you have in the Inter-Urban Railway Company?

Answer. I am not an officer in the Inter-Urban.

Cross-int. 6. What have you to do with the management or operation of that?

2621 Answer. I am Director of the Company, that is all.

Cross-int. 7. Are there any other electric railways operating in the City of Des Moines, other than those owned by the Des Moines City Railway Company and Inter-urban Company?

Answer. No, sir.

Cross-int. 8. Is what is known as the Urbandale line owned by either of these companies?

Answer. It is owned by the Des Moines City Railway Company; that is simply a name for it, the same as the Belt Line.

Cross-int. 9. When did the Des Moines City Railway Company acquire the title to the line running to Urbandale?

Answer. Always had it; built it.

Cross-int. 10. Well, wasn't the right of way for that road condemned in the name of the Inter-urban Railway Company?

Answer. Some of it was.

Cross-int. 11. And afterwards transferred to the Des Moines City Railway Company?

Answer. Yes, sir.

Cross-int. 12. The cars of the Inter-urban Railway Company run over the tracks of the Des Moines City Railway Company in the City, do they not?

Answer. Yes, sir.

Cross-int. 13. And form what points?

Answer. The Valley Junction cars run over it from Greenwood Park; the Army Post cars run from the City limits on the south, or about the City limits; and the Colfax cars run from right near Grand View Park there, very close to Grand View Park, where the two tracks are; and on the Beaver Valley line where it joins the City Railway tracks, just West of the Des Moines River, and also where the freight line joins, north of the Flint Brick Works.

2622 Cross-int. 14. You are acquainted with the condition of the Des Moines City Railway Company in respect to its capital stock, property and improvement, bonded debt, income and expenses, during the time that that Company has operated the system?

Answer. Yes, sir.

Cross-int. 15. Have you seen the circulars which are attached to the deposition of N. W. Harris, filed in this cause?

Answer. I have not.

Cross-int. 16. You have not seen those circulars?

Answer. No, sir.

Cross-int. 17. Don't know what they are?

Answer. I don't know what they are; No, sir.

Cross-int. 18. Does N. W. Harris or his firm own any of the capital stock of the Des Moines City Railway Company?

Mr. GUERNSEY: That is objected to as not being cross-examination. I don't believe you need to answer that question if you don't want to. It is further objected to as being wholly irrelevant, immaterial to any question in this case.

Mr. CLARK: Are you going to decide when it is cross-examination and when it is not?

Mr. GUERNSEY: I am going to try to.

Mr. CLARK: We are not going to be placed in the position of having you decide these matters.

Mr. BREMNER: Do I understand the witness declines to answer that question?

The WITNESS: Yes, sir.

Mr. BREMNER: We desire to have the record show that we insist upon an answer.

2623 Cross-int. 19. Do you know whether N. W. Harris whose deposition has been taken in this case, or his firm, N. W. Harris & Co., own any of the capital stock of the Des Moines City Railway Company?

Answer. I decline to answer on the advice of counsel.

Cross-int. 20. In acquiring, improving, maintaining and operating the system of street railways in the City of Des Moines, has the Des Moines City Railway Company acted solely in reliance upon and pursuant to the authority, rights and privileges granted in the Ordinance of December 10, 1866 and the amendments thereto?

Answer. It has acted on all the ordinances it has got.

Cross-int. 21. Well, what are those ordinances upon which it has acted?

Answer. The records of the City show that.

Cross-int. 22. Have there been any ordinances passed in favor of the Des Moines City Railway Company?

Objected to on the part of complainant as not the best evidence, and calling for a conclusion of the witness.

Answer. I think the records of the City would show that.

Cross-int. 23. Do you know whether there have been any ordinances passed by the City of Des Moines Granting directly to the Des Moines City Railway Company any rights to construct and operate street railways in the City?

Objected to on the part of complainant as being incompetnt, calling for the witness's conclusion as to the legal effect of the ordinance that have been referred to in the question, and which have also been introduced in evidence here.

Answer. The records of the city show that.

2624 Mr. Bremner: You can answer whether you know or not. Counsel for complainant interposes same objection as last above made.

Cross-int. 24. Do the records of the City show whether you know it or not?

Objected to on the part of complainant as being argumentative.

Answer. No.

Cross-int. 25. Then I insist on an answer of the question, whether you know or not?

Counsel for complainant interposes the same objection as heretofore made.

Answer. I think there is one ordinance, I think there is a freight ordinance was in the name of the City Railway.

Cross-int. 26. Aside from the freight ordinance, do you know of any ordinances passed by the City of Des Moines, granting any rights directly to the Des Moines City Railway Company?

Complainant interposes same objection as last above.

Answer. I don't know as I know positively enough to answer that question, Mr. Baily; I can't answer that.

Cross-int. 27. In the construction, acquisition and operation of its system of street railways, to what extent has the Des Moines City Railway Company acted and relied on the authority granted in the Ordinance of June 29, 1886 in favor of the Des Moines Broad Gauge Street Railway Company?

Objected to on the part of complainant as being incompetent, calling for a conclusion, and not proper cross-examination.

Answer. We always considered that ordinance was good.

Cross-int. 28. Well, have you acted and operated under that ordinance?

2625 Complainant interposes same objection as last above.

Answer. Some, yes, sir.

Cross-int. 29. To what extent?

(Same objection as last above.)

Answer. I don't know; I can't tell you what extent.

Cross-int. 30. What lines or parts of the system have been constructed and operated under the authority of that ordinance?

Answer. I don't know as I can answer that. The greater part of the system has been re-constructed and operated under it.

Cross-int. 31. As to the ordinance passed December 20, 1887 in favor of the Des Moines Broad Gauge Street Railway Company, has the Des Moines City Railway Company acted under the authority of that ordinance?

Answer. If they had that ordinance, they did.

Cross-int. 32. That is one of the ordinances that has been offered in evidence in this case; do you know whether the Des Moines City Railway Company has acted under the authority of that ordinance?

Complainant interposes the same objection last above made.

Answer. The ordinance is the best evidence of that.

Counsel for respondent move to strike the answer as not being responsive.

Cross-int. 33. To what extent has the Des Moines City Railway Company acted under the authority granted in the ordinance passed December 20, 1887?

Complainant interposes the same objection last above made.

Answer. I can't answer that question.

2626 Cross-int. 34. In the acquisition, construction, improvement, maintaining and operating of the street railway, has the Des Moines City Railway Company acted and relied upon the authority granted in the ordinance passed July 27, 1888, in favor of the Des Moines Broad Gauge Street Railway Company?

Answer. I can't answer that question.

Cross-int. 35. You don't know?

Answer. I can't answer the question.

Cross-int. 36. Is there any part of the system of railways of the Des Moines City Railway Company, that has not been acquired, con-

structed, maintained and operated under the authority granted in the three ordinances in favor of the Des Moines Broad Gauge Street Railway Company, to which reference has been made?

Counsel for complainant interpose the same objection last before made, and further that the question calls for a conclusion of law and is incompetent.

Answer. What do you mean by the three ordinances of the Des Moines Broad Gauge Street Railway Company; what three ordinances do you mean?

Cross-int. 37. I will ask you another question: is there any part of the system of street railways operated by the Des Moines City Railway Company, which are not maintained and operated under the authority of the three ordinances passed June 29, 1886, December 20, 1887, and July 27, 1888, in favor of the Des Moines Broad Gauge Street Railway Company.

Objected to on the part of complainant as being incompe-
2627 tent, calling for a conclusion of law which would have to be adduced from the facts and could not depend upon the mere opinion of the witness, not expert in the law.

Answer. I don't know.

Cross-int. 38. You have been the General Manager of the Des Moines City Railway Company ever since it has operated the Street Railway System?

Answer. Yes, sir.

Cross-int. 39. You are one of the incorporators?

Answer. Yes, sir.

Cross-int. 40. A member of the Board of Directors?

Answer. Yes, sir.

Cross-int. 41. And you don't know whether there is any part of the system that is not operated under the authority of these ordinances or not?

Counsel for complainant interposes the same objection as last above made.

Answer. No, sir.

Cross-int. 42. Do you know whether the Des Moines City Railway Company has claimed to be the assignee or owner of the rights, privileges and authority granted in the ordinances in favor of the Des Moines Broad Gauge Street Railway Company, passed July 29, 1886?

Answer. Yes, sir, I believed it so claimed.

Cross-int 43. Do you know whether the Des Moines City Railway Company does own them?

Objected to on the part of complainant as calling for a conclusion of law, and because the record is the best evidence on the subject.

Answer. The records in this case, and the contract show.

2628 Mr. CLARK: The question refers to your personal knowledge, do you or do you not know?

Answer. The records will show.

Mr. CLARK: Do you know yourself?

Mr. GUERNSEY: I don't suppose he has any knowledge outside of what the record shows.

Cross-int. 44. Do you know whether the Des Moines City Railway Company has claimed to be the owner and does claim to be the owner of the rights, privileges and authority granted in the ordinance of June 29, 1886, in favor of the Des Moines Broad Gauge Street Railway Company?

Answer. The records in this case and the contracts will show.

Mr. BREMNER: It don't show what the claims are.

Answer. Yes, sir, it shows the claims, and that it the best evidence to my knowledge, what those records show; I don't know anything outside of it.

Mr. POLK: I object to three lawyers cross-examining the witness.

Mr. BREMNER: We are entitled to an answer of yes or no; he can answer that question, by yes or no.

Answer. That is my knowledge, what the records show there.

Cross-int. 45. Do you know whether the Des Moines City Railway Company has claimed or claims to own the rights, privileges and franchises granted in the ordinances passed December 20, 1887, in favor of the Des Moines Broad Gauge Street Railway Company?

Answer. The records show that.

2629 Mr. BREMNER: We want an answer to these questions.

Answer. There is no better knowledge of that than what the records show.

Mr. BREMNER: The record don't show what the company claims.

Answer. O, yes, it does.

Cross-int. 46. Do you know whether the Des Moines City Railway Company owns or claims to own the rights, privileges and franchises granted by the ordinance passed December 27, 1888, in favor of the Des Moines Broad Gauge Street Railway Company?

Answer. The records show that.

Cross-int. 47. Does the record show what your knowledge is in regard to that?

Answer. The records show what the company claimed to own.

Counsel for complainant object to the question, in so far as the witness's knowledge is concerned as being absolutely immaterial.

Cross-int. 48. Mr. Hippee, during the time that it has operated this system of street railways in the City of Des Moines, has the Des Moines City Railway Company ever filed with the City Treasurer or any other officer of the City of Des Moines the statement of its net receipts provided for in Section 12 of the Turner Ordinance of December 10, 1866?

Objected to on the part of complainant as being incompetent, not the best evidence and calling for a conclusion.

Answer. Let's see, that consolidation was in 1893; I don't know whether they have or not. I am inclined to think they have.

2630 Cross-int. 49. Have they during the past ten years filed such a statement?

Complainant interposes the same objection as last above made.

Answer. That I don't know, Mr. Baily, whether they have or not.
Cross-int. 50. Have they during the last five years?

Complainant interposes same objection as last above.

Answer. No, sir, they have not. There was these reports filed regularly there for a long time.
Cross-int. 51. By the Des Moines City Railway Company?
Answer. I have answered that; I said I wasn't sure.
Cross-int. 52. You don't know whether it was the Des Moines City Railway Company or the Des Moines Street Railroad Company?

Same objection as last above is interposed.

Answer. No, sir; I am not sure.
Cross-int. 53. During the past ten years, has the Des Moines City Railway Company filed with the City Treasurer or any other officer of the City of Des Moines or the town of North Des Moines, the statement of net receipts provided for in section 11 of the Ordinance of North Des Moines, passed May 9, 1885, granting certain rights to the Des Moines Street Railway Company.
Answer. That refers wholly to North Des Moines?
Cross-int. 54. Yes, and whether they have filed it with any officer of North Des Moines or the City of Des Moines, for the last ten years?
Answer. No, sir.
Cross-int. 55. They have not?
Answer. No, sir.
2631 Cross-int. 56. State whether or not the Des Moines City Railway Company has during the past ten years paid to the City of Des Moines or any officer thereof, the three per cent. of net receipts provided for in Section 12 of the Turner Ordinance of December 10, 1866?

Objected to on the part of complainant as not proper cross-examination.

Answer. No, sir.
Cross-int. 57. Has the Des Moines City Railway Company paid to the City of Des Moines or any officer thereof, during the past ten years, the three per cent. of the net receipts provided for in section 11 of the North Des Moines ordinance, in favor of the Des Moines Street Railway Company?

Objected to for the same reason as last above.

Answer. No, sir.
Cross-int. 58. Has any one else paid the City of Des Moines, or to any officer thereof, the net receipts provided for in this ordinance during the past ten years?

Same objection as last above.

Answer. I don't know whether they have or not.
Cross-int. 59. Has the Des Moines City Railway Company paid to

the City of Des Moines, or any officer thereof, the five per cent. of net earnings provided for in section 20 of the ordinance passed June 29, 1886, in favor of the Des Moines Broad Gauge Street Railway Company.

Same objection as last above.

Answer. No, sir; they have not.

Cross-int. 60. Has any one, to your knowledge, paid that percentage to the City for the Des Moines City Railway Company?

Same objection.

Answer. Not to my knowledge.

2632 Cross-int. 61. Has the Des Moines City Railway Company paid to the City of Des Moines or any officer thereof, the five per cent. of net earnings provided for in the ordinance passed September 20, 1888, in favor of the Des Moines River Line Street Railway Company?

Same objection.

Answer. No, sir.

Cross-int. 62. So far as you know, has any one paid to the City that five per cent. of net earnings?

Answer. No sir.

Cross-int. 63. When was the street railway extended on Clark Street from 25th Street to Beaver Avenue?

Answer. I would have to refer to my notes on that; I think it was in 1901, but I am not sure about that.

Cross-int. 64. It was during the last five years?

Answer. I think so; I am of the opinion it was in 1901, but I am not sure.

Cross-int. 65. Under the authority of what ordinance was that line extended?

Objected to on the part of complainant as calling for an opinion and the conclusion of the witness of a matter of law; further, it assumes there was some specific ordinance in mind under which the extension was made, and it is a fact not proven.

Answer. I cannot answer the first question until I find it. The ordinances that the Des Moines City Railway Company owned at that time.

Cross-int. 66. Which of the several ordinances that the Des Moines City Railway Company owned at that time or claimed to own did it act under in extending that line?

Objected to on the part of complainant for the reason
2633 urged against the preceding question, and for the further reason it assumes a specific ordinance was selected and action taken under it, which is not proven.

Answer. I don't know, sir.

Cross-int. 67. Well, which of the several ordinances did it claim to act under in extending that line?

Same objection as last above.

Answer. I don't know.

Cross-int. 68. Did the Des Moines City Railway Company before constructing or extending that line, obtain any further or additional authority from the City of Des Moines, and if so, how additional to what was contained in the ordinances theretofore enacted?

Objected to as not being the best evidence.

Answer. Nothing as to the right to construct any tracks?

Cross-int. 69. About what time was the line of road which is the extension of the Center Street Lines, from Center street to a point on the North 20th Street somewhere?

Answer. I think that was in 1903.

Cross-int. 70. And under authority of which of the ordinances theretofore passed was that line constructed?

Same objection.

Answer. If there was any authority at all, it was granted to the Des Moines City Railway Company by the City Council.

(Cross-int. 70 repeated).

Answer. Under all the ordinances we owned.

Cross-int. 71. Well, what ordinances did you own or claim to own?

Answer. The records show that.

Cross-int. 72. Where does the record show that in this case?

Same objection, and that it is not cross examination.

2634 Cross-int. 73. State whether or not prior to constructing that road or extension of road, the Des Moines City Railway Company obtained any authority from the City of Des Moines in addition to what was contained in the ordinances theretofore passed and which have been offered in evidence in this case?

Answer. Yes, sir.

Cross-int. 74. What was it?

Answer. The right to construct on 7th street.

Cross-int. —. I am asking you from Center Street North to the termination on 20th Street?

Answer. No.

Cross-int. 76. The right given on 7th Street was obtained under that provision of the ordinance which related to tracks nearer than two blocks from existing tracks?

Answer. Yes, sir.

Cross-int. 77. In the new lines which the Des Moines City Railway Company has constructed since January 1898, has it obtained any authority from the City of Des Moines, in addition to the authority contained in the ordinances theretofore passed except in cases where the track was nearer than two blocks of existing tracks?

Objected to on the part of complainant as not the best evidence, and incompetent on that account, and because the ordinances and resolutions of the City introduced show the facts, and it is calling for a legal conclusion as to the legal effect of these ordinances and resolutions.

Answer. Not that I know of.

2635 Cross-int. 68. Well, if there had been, you would have known it, would you?

Objected to on the part of complainant as being argumentative.

Answer. I wasn't here all the time.

Cross-int. 79. During the year expiring in June 1897, had the Des Moines City Railway Company any net earnings of its system?

Answer. I don't remember.

Cross-int. 80. Did it have in the year expiring June 29th, 1898?

Answer. Why I don't know, Mr. Baily; I don't carry the books in my head.

Cross-int. 81. Do you know whether it has had any net earnings any year since 1898?

Answer. Yes, it had.

Cross-int. 82. How much?

Answer. I don't know, sir.

Cross-int. 83. Approximately how much?

Answer. I am not going to guess at it.

Cross-int. 84. Do you know about circulars having been sent out by Harris & Co. for the purpose of selling bonds?

Answer. I didn't prepare them, no, sir.

Cross-int. 85. Do you know about them?

Answer. No, sir.

Cross-int. 86. Did you ever see any of those circulars?

Answer. Not that I remember of; no, sir; yet I may have seen them; if I have, I simply glanced at them, read them over, that was all.

Cross-int. 87. Did you ever furnish to the Bond Company any information in regard to the gross earnings expenses and net earnings of the Des Moines City Railway Company in the past

2636 ten years?

Objected to on the part of complainant as being irrelevent, immaterial and not cross-examination.

Answer. Yes, sir, I did.

Cross-int. 88. Did you furnish it more than once?

Same objection as last above.

Answer. I expect I did.

Cross-int. 89. Well, how many times?

Answer. I don't know.

Cross-int. 90. Did you furnish a statement every year?

Same objection as last above.

Answer. Yes, sir.

Cross-int. 91. Have you copies of these statements?

Same objection as last above.

Answer. I doubt very much whether I have.

Cross-int. 92. Have you copies of any of them?

Same objection as last above.

Answer. Not that I know of.

Cross-int. 93. Do you know what are the net earnings of the Des Moines City Railway Company for the year ending December 31, 1905?

Objected to on the part of complainant as not being proper cross-examination, irrelevant and immaterial.

THE WITNESS: Do you want me to answer that?

Mr. GUERNSEY: I have no objection, if you know.

Answer. I can't remember. That was the year, 1905.

Cross-int. 94. On December 1st?

Answer. Seventy odd thousand dollars, if I remember right; I am not stating that as an out and out fact.

Cross-int. 95. Is that after deducting any part of its interest charge?

2637 Answer. I think so.

Cross-int. 96. Then it was considerable more than that not deducting its interest charge?

Answer. Naturally, yes.

Cross-int. 97. How much is the annual interest charge?

Objected to on the part of complainant as not being proper cross-examination.

Answer. The interest is somewhere near $140,000., if I remember right.

Cross-int. 98. Do you remember what was the amount of the net earnings of the Des Moines City Railway Company for the year ending December 31, 1904?

Answer. No, sir; I do not carry those books in my head, and I am not going to guess at this for you Mr. Baily.

Cross-int. 99. Can you tell approximately?

Answer. No, sir.

Cross-int. 100. Were there any net earnings for that year?

Answer. Yes.

Cross-int. 101. Were there any net earnings in excess, after paying interest charge?

Objected to on the part of complainant as being irrelevant, immaterial and not cross-examination.

Answer. Yes.

Cross-int. 102. Were there any net earnings for the year ending December 31, 1903?

Complainant interposes same objection as last above.

Answer. I don't know.

Cross-int. 103. You don't know whether there was that year or not?

Answer. I don't remember that. You are just going back every year on me; I don't carry those books in my head; I don't remember.

Mr. Baily, that last question you asked me, I will say, there 2638 were, but I don't know what they were.

Cross-int. 104. Mr. Hippee, in your direct examination

you were asked, Int. 122: What use has been made of the net earnings of the Company, and what has been approximately the aggregate amount of them during the period since 1889, up to January 1, 1905? Answer. The aggregate amount has been about $525,886, and they have been used in helping to pay for extensions, etc. Now, you have testified here as to the aggregate amount of the net earnings, how much have they been each year, since 1889?

Answer. I hav-n't got them in my head, sir.

Cross-int. 105. You have prepared a memorandum or made an examination for the purpose of answering this question?

Answer. Yes, sir.

Cross-int. 106. By reference to that memorandum, you can give us the information, can't you?

Answer. I could, yes, sir.

Cross-int. 107. Well, will you do it, we ask for it?

Answer. I can itemize it; that wants to be itemized.

Cross-int. 108. We want the amount each year. This was the net earnings over and above the interest charge, was it?

Answer. I think that is right; yes, sir.

Cross-int. 109. It was used in paying for extensions, new equipment and new machinery, so that it wasn't expended for interest charges?

Answer. No, sir.

Cross-int. 110. From that memorandum which you have, can you give us the amount of the net earnings exclusive of the interest cha-ge, or before deducting the interest charge?

2639 Objected to on the part of complainant as not being cross-examination.

Answer. Not from that, sir; from that memorandum, I can't.

Cross-int. 111. Can you give us the net earnings, at the same time that you obtain the memorandum that you promised to get, for the year ending January 1st, 1906?

Answer. I can, yes.

Cross-int. 112. And get us also the interest?

Answer. For the year 1905?

Cross-int. 113. Can you give us also the interest charge?

Objected to on the part of complainant as being incompetent, irrelevant and immaterial, not cross-examination.

Mr. BAILY: We want a statement showing the amount of net earnings not deducting the interest charge, as well as deducting it. We have no further cross-examination until the witness gets the memoranda in regard to the net earnings.

Mr. GUERNSEY: Well produce the witness now for cross-examination as to the other matters, and we will not produce him further.

Cross-int. 114. Mr. Hippee, you have been present at the meetings of the officers, directors and stockholders of the Des Moines City Railway Company since it has been operating this system, most of it?

Objected to on the part of Complainant as not being cross-examination.

Answer. I have been to a good many of them; I don't know that I have been to all of them.

Cross-int. 115. You have been to most of them?

Answer. I think so.

2640 Cross-int. 116. And the matter of the ordinances under which the street railway was operating has been a subject of discussion among the officers and directors frequently?

Objected to on the part of complainant as not cross-examination.

Answer. No, sir.

Cross-int. 117. State whether the Des Moines City Railway Company in operating this system, is operating under the ordinance passed June 29, 1886, in favor of the Des Moines Broad Gauge Street Railway Company?

Objected to on the part of complainant as calling for a conclusion of law, which must be deduced from a large number of independent facts, and because it is not cross-examination; also because it has been once gone over.

Answer. I can't answer that.

Cross-int. 118. Is the Des Moines City Railway Company operating its street railway under the authority granted in the ordinance passed December 20, 1887, in favor of the Des Moines Broad Gauge Street Railway Company?

Complainant interposes the same objection as last above made.

Answer. I can't answer it.

Cross-int. 119. Why, are you not able to answer, Mr. Hippee?

Answer. Because the records in this case are a better answer than I can give.

Cross-int. 120. Independent of the record, you may state what you know about that?

The same objection as last above is interposed.

Answer. I can't answer that.

2641 Cross-int. You can't answer that?

Complainant object- because counsel have no right to require the witness to express an opinion on a legal proposition of that kind.

Cross-int. 122. State whether or not the Des Moines City Railway Company is operating its system under the authority granted July 27, by the ordinance of July 27, 1888, in favor of the Des Moines Broad Gauge Street Railway Company?

Same objection as last above.

Answer. I decline to answer; I can't answer it.

Cross-int. 123. Do you know whether it does or not?

Answer. The records answer that question better than I can.

Cross-int. 124. Well, do you know?

Same objection as last above; for the further reason that the knowledge of the witness if wholly immaterial.

Cross-int. 125. Independent of what the records show, do you have any knowledge of the matter?

Answer. The records are the knowledge I have.

Cross-int. 126. In operating its system of street railways, is the Des Moines City Railway Company acting under the authority granted by the ordinance in favor of the Des Moines & Sevastopol road?

Same objection.

Answer. The record answers the question.

Cross-int. 127. Do you decline to answer further than that?

Answer. Yes, sir.

Cross-int. 128. In the operation of the street railway, is the Des Moines City Railway Company acting under the authority granted in the ordinance in favor of the Des Moines Rapid Transit Company?

2642 Same objection.

Answer. The records answer that.

Cross-int. 129. Do you decline to answer further?

Answer. Yes, sir.

Cross-int. 130. In the operation of its system of street railways, does the Des Moines City Railway Company act under the authority granted in the ordinance in favor of the Des Moines Belt Line Railway Company?

Same objection.

Mr. GUERNSEY: If I haven't done so, I want to put in an objection that it is not proper cross-examination and would like to have that apply to other like questions.

Answer. The records answer that question.

Cross-int. 131. Do you decline to answer further than that?

Answer. Yes, sir.

Cross-int. 132. In the operation of its system of street railways, does the Des Moines City Railway Company act under the authority granted in the ordinance in favor of the Des Moines River Line Street Railway Company?

Same objection as last above.

Answer. The records answer that.

Cross-int. 133. Do you decline to answer the question further than that?

Answer. Yes, sir.

Cross-int. 134. In the operation of its system of street railways, does the Des Moines City Railway Company act under the authority granted in the Turner ordinance of 1866?

Same objection.

Answer. The records answer that question.

2643 Cross-int. 135. Do you decline to answer further?

Answer. Yes, sir.

Cross-int. 136. To what extent, in the operation of its street rail-

ways does the Des Moines City Railway Company rely upon the authority granted in the Turner ordinance of 1866?

Same objection.

Answer. I don't know.

Cross-int. 137. Does it rely to any extent on the authority granted in that ordinance?

Same objection, and calling for a conclusion of law.

Answer. I don't know.

Cross-int. 138. You have stated that the Des Moines City Railway Company in the operation of its road was operating under all the ordinances which have been assigned to it; did I understand you correctly?

Answer. We rely on all the ordinances that we own.

Cross-int. 139. Well, now, do you know what ordinances you do own?

Answer. What the records show, what have been introduced in evidence.

Cross-int. 140. Independent of the records, what is your knowledge in regard to the matter or have you any knowledge?

Objected to as being immaterial and not cross-examination.

Answer. The records are the best evidence of what we claim to own; they are introduced in evidence; we rely on the terms of all of the ordinances introduced.

Cross-int. 141. Do you know ordinance of June 29, 1886 has been offered in evidence in this case?

Answer. Yes, sir; it has.

2644 Cross-int. 142. You were present at the time the testimony was being taken?

Answer. A part of it, not all the time, sir; I think I was in and out at different times, if I remember right; I wasn't here all the time.

Cross-int. 143. Do you know whether in the operation of the street railway, the Des Moines City Railway Company has relied upon the authority granted in the ordinance of June 29, 1886, in favor of the Des Moines Broad Gauge Street Railway Company—this is, whether you know or not?

Objected to on the part of complainant as being irrelevant and immaterial, and for the further reason, that the matter has been gone over at least twice before.

Answer. We rely on the terms of all the ordinances that were introduced in evidence here.

Cross-int. 144. The Des Moines City Railway Company is constructing a new line on East Fourteenth Street, is it not?

Answer. Yes, sir.

Cross-int. 145. Where is that line running to; how far north does it extend?

Answer. About to Hull Avenue.

Cross-int. 146. Is that where the terminus is to be, or is it to extend on further?

Objected to as not being cross-examination.

Cross-int. 147. How far north is that line to be constructed?
Answer. To Hull Avenue.
Cross-int. 148. That will be the terminus of it, will it?
Answer. Yes, sir.
Cross-int. 149. From that point, is the line to be constructed by the Inter-Urban Railway Company to Marquisville?

2645 Mr. GUERNSEY: I object to the question as not being cross-examination, and I advise the witness not to answer; it is something counsel have no concern with.

Answer. I decline to answer.
Cross-int. 150. Under authority of what ordinance is the Des Moines City Railway Company constructing that line on East 14th Street?

Same objection.

Answer. All the ordinances we claim to have any rights under and introduced.
Cross-int. 151. Is it constructing that line under the authority of the Turner Ordinance of December 10, 1866?

Same objection, and because it has all been answered.

Answer. I have answered that question by the prior answer.
Cross-int. 152. To what extent is it acting under the Turner ordinance of 1866 in constructing that line?

Same objection.

Answer. My prior answer answers that.
Cross-int. 153. To what extent is it acting under the authority of the ordinance of June 29, 1886 in constructing that line.

Same objection.

Answer. My answer answers that.
Cross-int. 154. In addition to what is or may be contained in any ordinances heretofore passed, has the Des Moines City Railway Company obtained any further authority from the City for the construction of that line?
Answer. No, sir.

Mr. BAILY: I don't think of anything further we want, except the statement of the net earnings.
Here an adjournment was taken until Aug. 31, 1906 10 o'clock A. M.

2646 AUGUST 31, 1906, 10 o'clock A. M.

G. B. HIPPEE, recalled for further cross-examination. Examined by Mr. W. H. BAILY as follows:

Cross-int. Mr. HIPPEE: Before we go any further, I want to make a correction of my testimony yesterday, in regard to my answer to the question as to my official relation with the Inter-Urban. I was Treasurer, as well as Director of the Inter-Urban Company.

Cross-int. 155. Mr. Hippee, give us the net income each year, from 1889 to 1906 of the street railroad system operated by the Des Moines Street Railway Company or the Des Moines City Railway Company.

Answer. This commences December 31, 1890, $25,156.65.

"	"	1891, 7,156.36
"	"	1892, 20,252.62
"	"	1893, 21,876.40
"	"	1894, 12,071.85
"	"	1895, 9,090.05
"	"	1896, No earnings.
"	"	1897, 2,030.02
"	"	1898, 3,007.80
"	"	1899, 19,313.27
"	"	1900, 27,849.73
"	"	1901, 36,521.28
"	"	1902, 72,232.42
"	"	1903, 92,658.88
"	"	1904, 79,478.85
"	"	1905, 80,995.52

Now I want to say in explanation of this, that this don't foot up 525,000; it foots up 509,621.70. Coming from this there were items of paving that have been a matter of dispute, as to 2647 where that is to be charged. To meet these figures yesterday from the statements, I took the smallest amount and threw the paving out.

Cross-int. 156. These items that you gave are the net earnings?

Answer. After the operating expenses, tax and interest and everything are paid.

Cross-int. 157. Including special assessments?

Answer. Well, some of the special assessments, yes; it wouldn't include them all.

Cross-int. 158. What has been the interest charge each year during that period?

Answer. For 1890, $29,639.38

"	'91,	54,428.39
"	1892,	72,558.32
"	1893,	68,058.11
"	1894,	78,349.72
"	1895,	73,781.75
"	1896,	74,911.24
"	1897,	76,267.10
"	1898,	75,602.50
"	1899,	76,581.56
"	1900,	78,183.88
"	1901,	86,804.40
"	1902,	96,562.11
"	1903,	111,265.44
"	1904,	132,860.50
"	1905,	150,004.71.

Cross-int. 159. There are some matters I overlooked yesterday:

The Urbandale line operated by the City Railway Company, runs to a point outside of the corporate limits of the City?

Answer. Yes, sir, just outside.

Cross-int. 160. Is it platted territory over there at Urbandale?

Answer. I don't believe it is. There is a plat of that territory, but I don't believe the plat is on record, Mr. Baily.

Cross-int. 161. The Des Moines City Railway Company runs a Passenger Car to the village of Norwoodville, outside of the corporate limits?

Answer. No, sir, that car is operated by the Inter-Urban.

2648 Cross-int. 162. Does the Des Moines City Railway Company operate Passenger cars to any point outside of the city limits, other than the Urbandale?

Answer. No, sir they do not, not the Des Moines City.

Cross-int. 163. Who operates the passenger cars that run to the Army Post or Ft. Des Moines?

Answer. That track is Inter-Urban, and those earnings on that track belong to the Inter-Urban Company.

Cross-int. 164. Who operates the passenger car?

Answer. The City Railway cars run there, but they pay their share of the operating expenses, for their proportion.

Cross-int. 165. That is, the City Railway Company pays to the Inter-Urban Company for the use of the track?

Answer. No, they pay us for their share of the operation of the road.

Cross-int. 166. Who receives the fares?

Answer. They receive the fares outside of the City; we receive the fares inside of the city.

Cross-int. 167. How is it about the passenger cars that run to Valley Junction?

Answer. It is the same way.

Cross-int. 168. How do you distinguish between the fares that belong exclusively to the Des Moines City Railway Company and those of the Inter-Urban Company?

Answer. Our conductors keep a record of those fares as carried past the park; it is a good deal of an arbitrary division.

M. CLARK: But in the operation of the car itself and in the traffic, it is operated by the Des Moines City Railway Company; the Des Moines City Railway Company hires the conductors?

2649 Answer. We hire those conductors, yes, but we don't pay them directly; we get our pay for the use of them.

Mr. CLARK: You get your pay, of course, but it is all under the operation of the Des Moines City Railway Company; you receive your compensation from them for operating the car?

Answer. Yes, sir.

Mr. CLARK: That is true of the car running to Norwoodville?

Answer. No.

Mr. CLARK: Is it true of the car running to the Army Post?

Answer. It is true there.

Cross-int. 169. The cars which run to the Army Post and to Valley Junction are the cars of the Des Moines City Railway Company,

and the Motoneer and the conductor are employés of that Company?

Answer. Yes, sir.

Cross-int. 170. And as to the fares collected for that portion of the run which is over the tracks of the Inter-Urban Railway Company, there is a division between the two companies of the proceeds of those fares?

Answer. Yes, sir.

Cross-int. 171. And all the expenses of operation?

Answer. Yes, sir.

Cross-int. 172. But the Norwoodville car is run entirely by the Inter-Urban Railway Company?

Answer. Their men run that car, yes, sir.

Cross-int. 173. The same is true of the Perry line and of the Colfax line?

Answer. Yes, sir.

Cross-int. 174. And the Inter-Urban Railway company runs those passenger cars to the Central Station or waiting room of the Des Moines City Railway Company?

2650 Answer. Yes, sir.

Cross-int. 175. And pays for the use of those tracks, for the operation over them?

Answer. Yes, sir.

Cross-int. 176. They run from the terminus of the Inter-Urban lines to the Waiting Room over the tracks of the Des Moines City Railway Company?

Answer. Yes, sir, from the termini of their tracks they go to the Des Moines City Railway tracks and go to the waiting room over the central loop. The combination express car runs to their freight station over the same tracks; whether it is the Beaver Valley line, the Colfax line the Army Post line and the Valley Junction line, it is the same thing.

Cross-int. 177. The Electric power is all furnished from the plant of the Des Moines City Railway Company?

Answer. Yes, sir; that is, the direct electric power is, the first power.

Cross-int. 178. All the power inside of the City?

Answer. Yes, it is handled over again out on their line; the direct power is furnished by the Des Moines City Railway Company.

Redirect examination by Mr. GUERNSEY:

Int. 1. With reference to this inter-urban situation, there is another proposition here I want to ask one or two questions about: The Colfax line referred to, is a line that runs from Des Moines to Colfax?

Answer. Yes, sir.

2651 Int. 2. Now, there is a Beaver Valley line referred to, that is a line owned by the Inter-Urban Railway Company also, running from Des Moines to Woodward, and being built into Perry Now?

Answer. Yes, sir.

Int. 3. This Beaver valley line is about 40 miles long, including the Perry end of it?

Answer. Practically that; about 39 and a fraction.

Int. 4. And the Colfax line is about how many lines long?

Answer. That is about 23 if I remember right; 23 or 25.

Int. 5. And the Army Post or Military Reservation is about five miles from the Waiting Room here?

Answer. About that; yes, sir.

Int. 6. How much Inter-Urban track is there out there?

Answer. Why, to the entrance of the Army Post, I think it is about two miles and a half. They have got more track than that, that runs around what they call their freight tracks, running into the Quartermaster's Departments there.

Int. 7. And then Valley Junction is about 5 miles from Des Moines?

Answer. Yes.

Int. 8. How much Inter-Urban track is there?

Answer. About two miles and a half there.

Int. 9. By saying Valley Junction is 5 miles from Des Moines, I mean the center of Des Moines?

Answer. That is where we figure our distance from.

Int. 10. Referring to these cars operated to Valley Junction and Ft. Des Moines, they are the ordinary City Street cars?

Answer. Yes, sir.

2652 Int. 11. Each one of those Inter-Urban lines connects with the line of the City Railway Company?

Answer. Yes, sir.

Int. 12. And to Colfax and on the Beaver Valley Division running to Woodward and being built into Perry, what are known as Inter-Urban cars are run?

Answer. Yes, sir.

Int. 13. Electricty is the motive power?

Answer. Yes, sir.

Int. 14. And these cars run from the end of each Inter-Urban line to the Waiting Room and back?

Answer. Yes, sir.

Int. 15. So that the City Railway Company furnished them access to the center of the City?

Answer. Yes, sir.

I want to say, Mr. Baily asked me about the Norwoodville car; that Norwoodville is a City Railway car, but the City Railway doesn't operate it.

Int. 16. By City Railway car, you mean the City Railway has title to the car?

Answer. Yes, sir.

Int. 17. Norwoodville is a mining camp?

Answer. It is a coal mining camp.

Int. 18. About how far is that from the Waiting Room?

Answer. I don't know; about seven miles, may be, the way they run to it; I am only guessing at that, because I am not familiar with the distance on that line.

Int. 19. This car runs on the tracks of the City Railway Company to their connection with the Colfax division of the Inter-Urban?

Answer. Yes, sir.

2653 Int. 20. Then over the Inter-Urban tracks to Norwoodville?

Answer. Yes, sir.

Int. 21. Now these various termini of the Inter-Urban tracks are all of them three or four miles from the Center of the City, are they not, from the waiting room, or more than that?

Answer. Yes, sir.

Int. 22. So much of the Inter-Urban track as is in the City, is on its own private right-of-way, except where it crosses a few streets?

Answer. Yes, sir.

Int. 23. And where the Inter-Urban cars are run in the streets, they are run over the tracks of the City Company?

Answer. Yes, sir.

Int. 24. Use its poles and wires?

Answer. Yes, sir.

Int. 25. Do you know how far out of the City limits this Urbandale line runs?

Answer. I don't believe it is a half a mile; I am not sure; but it is just a very short distance outside of the City.

Int. 26. To describe that a little more definitely, do you know the quarter section into which this line runs adjoins the City limits?

Answer. That has always been my understanding, that the City limits was on our east line, that quarter section is; if that is right, it simply runs just outside.

Int. 27. How far into this quarter section does this Urbandale line run?

Answer. It runs to the center.

Int. 28. Is there any village there?

Answer. No, sir.

2654 Int. 29. Any stores there?

Answer. No, sir.

Int. 30. Simply a farm?

Answer. Yes, sir; there has been some lots sold on the northeast portion of it.

Int. 31. What size are they?

Answer. They were two and a half acre lots.

Int. 32. In this 160 acre field?

Answer. Yes, sir.

Int. 33. When were they sold?

Answer. Last spring.

Int. 34. You referred to what we call the freight ordinance as the only ordinance granted by the City since the Des Moines City Railway Company was organized, in which the Des Moines City Railway Company was named as the grantee; do you remember an ordinance relative to hauling freight to the Fair ground and Great Western Tracks, for about a week during the State Fair?

Answer. Yes, sir; there — such an ordinance.

Int. 35. Do you remember whether the Des Moines City Railway Company was named grantee in that ordinance or not?

Objected to on the part of respondent as being incompetent, for the reason that the ordinance itself is the best evidence of what it contains.

Answer. Yes, sir.

Int. 36. Now, your attention was called to various extensions made by the street railway, and you were asked as to various of them, under what ordinance they were built, and to what extent reliance was placed upon a particular ordinance; I wish you would state whether, when extensions were built, the Company, so far as
2655 you know, has ascribed them to any particular ordinance?

Answer. They have not.

Int. 37. Now, you were asked whether any statements have been filed by the Des Moines City Railway Company, under section 12, I think it is, of the ordinance of December 10, 1866, which we have called the Turner Ordinance or Turner Franchise; have you looked that up?

Answer. I said there was no particular ordinance; the idea was, we always considered we had these different ordinances and the terms was good; some were perpetual and some were limited; extensions were not made with reference to any special grants; we considered all grants covered all the streets.

Respondent moves to strike the answer of the witness as not responsive to any question, and a statement of a conclusion.

Int. 38. Now, referring to this section 12, of the Ordinance of December 10, 1866, have you investigated since yesterday to see whether any statements under that were filed by the Des Moines City Railway Company?

Answer. I think there were four statements filed.

Int. 39. You stated on yesterday that the three per cent. provided for in that section had not been paid by the Des Moines City Railway Company; why was it that that wasn't paid by the Des Moines City Railway Company?

Objected to on the part of respondent as being immaterial, irrelevant and incompetent.

Answer. A good many years ago, when that was taken up by the City, we insisted on paying under that provision of the ordinance; they claimed that wasn't valid and wanted us to pay our tax; the tax amounted to a good deal more than the three per cent. would
2656 amount to, and we yielded on that and paid the tax.

Int. 40. This section contains this provision, referring to this three per cent.: And the tax herein above provided shall be in lieu of all taxes and assessments for all said purposes upon the property of said company, and on the right property or interest of any person in the same and the property and stock of said company and the members thereof in the same shall not be taxed in any other manner for any municipal purpose.

Now, state whether the City was willing to accept this three per cent. under the provisions of this ordinance in lieu of those taxes?

Answer. No, sir; they were not.

Int. 41. On the refusal of the City to accept it, what is the fact as to whether the Company has been paying its tax and special assessments?

Answer. They have.

Int. 42. What is the fact as to whether they amounted to more than the three per cent.?

Answer. Yes, sir; they do.

Int. 43. Now you were asked with reference to payments of various provisions of the Broad Gauge Ordinances, as to percentage of gross receipts and stated no such payments had been made; have any such payments been demanded by the City?

Answer. They have not.

Int. 44. In this freight ordinance, enacted on the 4th of February, 1895, there is a provision for the payment of five per cent. to the City of the gross receipts received for freight, as I recall it;
2657 state whether or not the payments under that ordinance have been made by the Company each year?

Answer. They have.

Int. 45. You were asked with reference to the extension on East 14th street; please state whether that extension had been commenced at the time of your direct examination?

Answer. It had not.

Int. 46. What particular reasons were there or are there making the necessity for it now urgent?

Answer. The people along that street have been asking for it for several years, and it is growing quite fast there, a good many new houses being built, etc., and we thought it necessary to take care of the traffic that is growing there.

Int. 47. Have they any other street railroad service?

Answer. They have none there except East Ninth Street, which is overcrowded.

Recross-examination by Mr. BAILY:

Cross-int. 1. In regard to the passenger cars running to Valley Junction and the Army Post, the transfers issued on other lines are good on those cars to the termination at the Army Post, or at Valley Junction, are they?

Answer. Yes, sir.

Cross-int. 2. And the transfers issued on those lines are good over the other lines?

Answer. Yes, sir.

Cross-int. 3. You say that the Des Moines City Railway Company has filed four statements under the Ordinance of December 10, 1866, when were those four statements filed?

2658 Answer. I think it was in 1894, 1895, 1896 and 1897.

Cross-int. 4. There have been no statements filed since then?

Answer. Not to my knowledge; no sir, Mr. Baily.

Cross-int. 5. Now, you say that the City insisted that that pro-

vision of the ordinance with regard to the three per cent. was invalid; who on behalf of the City insisted upon that?

Answer. The meeting that I have got in mind more than any other, was a meeting there a good many years ago, of the Board of Equalization, and some members of that board, while we had the matter up under discussion, went into the City Solicitor's office and talked the matter over with the City Solicitor. As I remember, the thing that impressed me more than anything else, was the claim that that clause under that ordinance covered special assessments. He says, you don't want to abide by this; he says, the City can't stand for this.

Cross-int. 6. Who was it said that?

Answer. I don't remember; it was in the City Solicitor's office.

Cross-int. 7. That was the Board of Equalization and the City Solicitor?

Answer. Yes, sir; that is the item that I remember particularly about.

Cross-int. 8. You say that the City was unwilling to accept the three per cent. and there was no action by the City Council upon that subject other than the Board of Equalization?

Answer. Not that I remember, except the action assessing us for regular taxes.

Cross-int. 9. You say that the regular tax would be more than the three per cent.; do you know what the regular city taxes have been for those years, have you examined to see?

2659 Answer. No, I have not, Mr. Baily.

Cross-int. 10. You don't know what the amount of the City taxes have been as distinguished from the entire amount of taxes, do you?

Answer. No, I do not.

Cross-int. 11. Then you might be mistaken as to whether the City tax had exceeded the three per cent.?

Answer. Yes, I might be; I never examined it.

Cross-int. 12. As a matter of fact, you don't know whether three per cent. is more or less than the amount of City tax for any of this times?

Answer. Just what we considered it, it was less than we were paying in taxes.

Cross-int. 13. What do you say was the reason you never had paid the five per cent. under the Broad Gauge Ordinance?

Objected to on the part of complaint as assuming a state of facts not founded in fact.

Question withdrawn.

Cross-int. 14. The only reason why you hav-n't paid the five per cent. of net receipts under the Broad Gauge Ordinance, is because the City has never demanded it?

Answer. I don't know that is the only reason, but they never demanded it.

Cross-int. 15. Has the Des Moines City Railway Company ever taken up and considered the question of whether it was or was not

liable to the City for anything under the five per cent. provision of the Des Moines Broad Gauge Ordinances?

Objected to on the part of complainant as not being cross-examination, asking for what necessarily must be privileged, because it involves a consideration of this legal proposition by the Des
2660 Moines City Railway Company, and is wholly irrelevant and immaterial.

Answer. Not that I remember Mr. Baily.
(Signed) G. B. HIPPEE.

Subscribed in my presence and sworn to before me by the said G. B. Hippee, this 17th day of September 1906.

[SEAL.] (Signed) J. P. BLAISE,
Examiner and Notary Public, Polk County, Iowa.

Mr. BAILY: We have decided not to cross-examine Mr. Polk.

Respondent objects to each of the copies or transcripts of ordinances, resolutions or records of the City *of* Town, offered in evidence by complainant, for the reason:

1st. That they are not authenticated, approved or certified in the manner provided by law, and therefore moves that each of said copies and transcripts be excluded — said reason.

2nd. Respondent objects to each of the ordinances or resolutions of the City or Town offered in evidence by complainant, for the reason that there is no evidence and it does not appear that they were passed, adopted, signed, approved and recorded or published in the manner provided by law, and therefore moves that each of said ordinances or resolutions be excluded for said reasons.

Mr. GUERNSEY: Counsel for complainant requests counsel for defendant to indicate in what particulars they claim that the
2661 certified copies which they move to strike out are not properly certified.

Mr. CLARK: Counsel for the respondent decline to point out the difficulties under which complainant has placed itself in introducing its evidence, and rely on the record as made by the respondent in this case.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

2662 Now on this 13th day of September, 1906, at four o'clock P. M., at the office of Read & Read, the further taking of testimony on the part of Complainants was resumed, before Emma K. Blaise, Examiner, as follows:

Mr. GUERNSEY: The complainant, in view of the motion to strike and objections made at the close of Mr. Hippee's cross-examination, re-offers certain Ordinances, and first offers Ordinance No. 28, being offered from the printed Revised Ordinances of 1869 of the City of [illegible] already referred to in the testimony, said Ordinance No. 28 being as follows:

To which offer the respondent objects, for the reason that it is

incompetent, irrelevant and immaterial, and for the further reason that it is not shown that the offer as made is contained in the ordinances of the Revision of 1869.

Mr. GUERNSEY: In order to meet counsel's objection I will read the entire offer from the book and will ask the Examiner to take it in writing instead of copying it.

Mr. CLARK: The objection wasn't for the purpose of making you read it.

Mr. GUERNSEY: You say that it don't appear that it was from this ordinance.

Mr. CLARK: Well, have you introduced that ordinance book?

Mr. GUERNSEY: I have offered the title page.

Mr. CLARK: Prior to this time?

Mr. GUERNSEY: Certainly, yes.

2663 "Number 28.

Street Railroads.

"An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines.

"SECTION 1. Be it ordained by the City Council of the City of Des Moines, That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon, and along all the streets, and such alleys only fronting on which said Company have depots, stables, or car-houses, and over the bridges and such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the condition hereinafter mentioned and prescribed.

"SEC. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway-car or carriage used upon any other railway in this State shall be used upon any of said tracks.

"SEC. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars, and carriages for that purpose shall be of the best style and class used on such railways in other cities: Provided, said company shall at all times have the right to use their track for transporting
2664 iron, ties, and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said company.

"SEC. 4. The track of such railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may establish such grades; where the streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets: provided, that they raise the same to the grade when the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the tracks: provided, said company shall plank the space between the tracks at each principal street-crossing whenever required by the Street Committee.

"SEC. 5. The said city of Des Moines shall not be held liable to said company for any damages that may be occasioned by the breakage of any gas or water-pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas-pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

"SEC. 6. Said tracks shall be laid in the center of the
2665 streets in all cases where it is practicable to so lay them, and except where a double track is contemplated in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley, as provided for in Section One, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley: provided, however, that if said Company shall have its depot, stations, stables, or car-houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out track leading from such alleys into such depots, stations, stables or car-houses.

"SEC. 7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five (5) years after the completion of the first mile of track, and thereafter shall not exceed the rate of six cents for any one route.

"SEC. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder, or interfere with any of said railway-cars, by placing, driving, or stopping, or causing to be placed, or
2666 driven in a slow pace, or stopped, any team, vehicle, or other obstacle, in, upon, across, along or near the track of said railway, or either of them, after being notified by the driver or con-

ductor, by the ringing of the car-bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the Mayor of said city, be fined in any sum not less than five or more than fifty dollars.

"SEC. 9. This charter is granted, and the rights and privileges herein conferred, are subject to the following conditions and qualifications, to-wit:

"That said company shall have at least one mile of said railway fully completed and equipped, and cars running upon the same by the first day of January, A. D. 1869.

"That they shall have one additional mile so completed and equipped, and cars running thereon by the first day of January, A. D. 1871.

"And one additional mile, fully completed and equipped, and cars running thereon by the first day of January, A. D. 1873, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited and revert to the city of Des Moines: provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section, for the completion of such given number of miles of said railway: provided, that in case any such injunction or order of court, or any judge is
2657 procured upon the application of any party other than the said city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order, and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company: said company shall pay the City Solicitor a reasonable fee for services rendered, and unless such notice is given, the time of the continuance of such order or injunction shall not be so given to said company.

"SEC. 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"SEC. 11. After the year A. D. 1875, whenever there may be any fair-grounds, or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some central part of the city, and it may be deemed for the public interest to have a street railway built to or near such fair-grounds or other place of public resort, the City Council may, by a two-thirds vote require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such route within

one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall
2668 have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the same time and run the same upon the same terms as the company to which this grant is made.

"SEC. 12. Said company shall annually on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be subscribed and sworn to by the Secretary and Treasurer of the company, and there shall be levied on such net receipts a tax of three per cent. for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchise of said company, in the same manner and to the same extent that other taxes levied by the city are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be such net receipts, and the city tax shall be levied thereupon as above provided. And the tax hereinabove provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof, in the same shall not be taxed in any other manner for any municipal purpose.

"SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railway-company in conformity
2669 with the following rules and regulations, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near at stations.

(4) No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

(5) No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street, or to take on or leave off passengers.

(6) The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when, by so doing, such injury may be averted.

(7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons, and other vehicles.

(8) The conductors shall use proper diligence to prevent ladies, or

children under twelve years of age from leaving or entering the cars while in motion.

(9) Conductors shall announce to passengers in a distinct tone, the names of all streets crossed as the cars approach such
2669½ cross-streets, and they shall observe the same rules when nearing the track of any other railway-company.

(10) The cars after sun-set shall be provided with signal lights.

(11) No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses, and at each end of the lines, and the stations nearest the passenger depots of other railway-companies: at which excepted stations they may stand a longer time.

"SEC. 14. Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company, and when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever.

"SEC. 15. This ordinance shall take effect from and after its publication in the Daily Iowa State Register.

"Passed Dec. 10, 1866; Published Dec. 11, 1866."

The complainant now offers the title page of the printed book known as The Revised Ordinances of the City of Des Moines, Revised and Arranged by order of the City council, 1874, it being the book already referred to and from which certain ordinances have been offered, said title page being as follows:

2670 "The Revised Ordinances of the City of Des Moines, Revised and Arranged by Order of the City Council, 1874. Containing a list of the City Officials from its organization as a city, in the year 1857 to 1875. The Statutes of this State relating to Cities and Incorporated Towns as enacted in the Code of 1873, and acts of the Fifteenth General Assembly. All Ordinances of the City of a general or permanent nature now in force, and other legislation, providing for the change of City Government under the laws of the State of Iowa.

By M. H. King, Taylor Peirce, and John R. Rollins, a committee appointed by the City Council to revise the City Ordinances."

To which offer the respondent objects for the reason that the same is incompetent, irrelevant and immaterial.

Complainant offers Chapter No. 31 of the Revised Ordinances of 1874, from which the title page has been offered, and from which the ordinance adopting the Revision has already been offered, said Chapter No. 31 being the Turner franchise as re-enacted, as follows:

To which offer respondent interposes the same objection last above made.

"Number 31.

(Ordinances Nos. XXVIII, LXXXV, and CXCI.)

Street Railroads.

"An Ordinance Authorizing the Construction and Operation of certain Street Railroads in and along the Streets of the City of Des Moines.

2671 "SECTION 1. Be it ordained by the City Council of the City of Des Moines, That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches in, upon and along all the streets, and such alleys only fronting on which said Company have depots, stables, or car-houses, and over the bridges and such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use, and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.

"SEC. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

"SEC. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities: provided, said company shall at all times have the right to use their track for transporting iron, ties, and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement
2672 that may be hereafter entered into by and between the City of Des Moines and said company.

"SEC. 4. The track of such railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may establish such grades; where the streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets: provided that they raise the same to the grade when the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the tracks: provided, said company shall plank the space between the track at each principal street-crossing whenever required by the Mayor.

"SEC. 5. The said City of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water-pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

"SEC. 6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make
2673 the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley; as provided for in section one, a single track only shall be laid, and no side-tracks, switches, or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley: provided, however, that if said company shall have its depot, stations, stables, or car-houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car-houses.

"SEC. 7. The rate of fare upon any line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five (5) years after the completion of the first mile of track, and thereafter shall not exceed the rate of six cents for any one route.

"SEC. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team vehicle, or other obstacle, in, upon, across along or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car-bell, or otherwise, and whoever shall wilfully
2674 violate any of the provisions of this section, shall, upon conviction thereof before the Police Magistrate of said city, be fined in any sum not less than five nor more than fifty dollars.

"SEC. 9. This charter is granted, and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one miles of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D. 1872, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct

the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and *repeal* to the city of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of such given number of miles of said company. Provided that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order; and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall
2675 pay all expenses that may accrue by reason of such suit or suits, and unless such notices — the time of the continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

"SEC. 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"SEC. 11. After the year, A. D. 1875, whenever there may be any fair grounds, or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some central part of the city, and it may be deemed for the public interest to have a street railway built to or near such fair grounds or other place of public resort, the City Council may, by a two-thirds vote require said company to build such direct or connecting route; and if said company in such case fail or neglect to build
2676 such route within one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route with the same time and run the same upon the same terms as the company to which this grant is made.

"SEC. 12. Said company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be

subscribed and sworn to by the Secretary and Treasurer of the Company, and there shall be levied on such net receipts a tax of three per cent., for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the city are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be such net receipts, and the city tax shall be levied thereupon as above provided. And the tax hereinabove provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof, in the same shall not be taxed in any other manner for any municipal purpose.

2677 "SEC. 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near *at* stations.

(4) No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

(5) No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street, or to take on or to leave off passengers.

(6) The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and at the appearance of danger to any one on or near the track, the cars shall be stopped when, by so doing, such injury may be averted.

(7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons, and other vehicles.

(8) The conductors shall use proper diligence to prevent ladies, and children under twelve years of age, from leaving or entering cars while in motion.

2678 (9) Conductors shall announce to passengers in a distinct tone, the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railway company.

(10) The cars after sunset shall be provided with signal lights.

(11) No car shall remain standing at any of the stations more

than ten minutes, except at stations for watering horses, and at each end of the lines, and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

"SEC. 14. Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company, and when so accepted this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever."

Complainant offers in evidence the title to the printed book of the Revised Ordinances of the City of Des Moines of 1879, being the printed revision of the ordinances of said city of said date from which offers have already been made in evidence, said title page being as follows:

"The Revised Ordinances of the City of Des Moines of
2679 1879. The Original Charters, Proceedings to Abandon the
Same, and the General Incorporation Laws with Amendments
and Additionals thereto.

Compiled and Revised by E. A. Hammer and N. K. Davis.

Published by Authority of the City Council."

To which offer respondent interposes the same objection last above made.

Complainant offers in evidence from the said Revised Ordinances Chapter 47, as follows:

Respondent interposes the same objection last above made.

"CHAPTER 47.

On Street Railways.

"An Ordinance Authorizing the Construction and Operation of Certain Street Railroads in and along the Streets of the City of Des Moines.

O. 63. P. December 19, 1868.

"SECTION 1. Be it ordained by the City Council of the City of Des Moines, That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches, upon and along all the streets, and such alleys only fronting on which said Company have depots, stables, or car-houses, and over the bridges and on such
streets in the city of Des Moines, with their present and
2680 and future extensions and connections, and authority is
hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner,

and for the time, and upon the conditions hereinafter mentioned and prescribed.

"2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

"3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used in such railways in other cities; provided, said company shall at all times have the right to use their cars for transporting iron, ties and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the city of Des Moines and said company.

"4. The tracks of said railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may have established such grades; where the streets are not graded, said company may, if they desire, lay their tracks so as to conform to the surface of such streets; provided, that they raise the same to grade whenever the city shall grade the same or any part thereof, and in case said city shall at any [681] time pave or otherwise improve the surface of any streets along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks; so that it shall substantially correspond with the improvements of the street outside of the track; provided, said company shall plank the space between the tracks at each principal street crossing whenever required by the Street Committee.

"5. The said City of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

"6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley as provided for in section one, a single track only shall be laid, and no side tracks, switches, or turnouts except in case where turn-outs are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley; provided however, that if said company shall have its depot, stations, stables, or

car-houses on any lot fronting on such alleys, they shall have
2682 the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables or car-houses.

"7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five (5) years after the completion of the first mile of tracks, and thereafter shall not exceed the rate of six cents for any one route.

"8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team vehicle, or other obstacle, in, upon, across, along, or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car-bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section, shall, upon conviction thereof before the Police Judge of said city, be fined in any sum not less than five nor more than fifty dollars.

"9. This charter is granted, and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running
2683 thereon, by the first day of January, A. D. 1872, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and *report* to the city of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of such given number of miles of said railway. Provided, that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order; and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall pay all expenses that may accrue by reason of such suit or suits, and unless such notice are given the time of the continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of

said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

2684 "10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"11. After the year A. D. 1875, whenever there may be any fair grounds, or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some central part of the city, and it may be deemed for the public interest to have a street railway built to or near such fair grounds or other place of public resort, the City Council may, by a two-thirds vote require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such route within one year from the time of being notified of such requirement to build such direct or connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the same time and run the same upon the same terms as the company to which this grant is made.

"12. Said Company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the

2685 first day of January then next preceding, which said statement shall be subscribed and sworn to by the Secretary and Treasurer of the Company, and there shall be levied on such net receipts a tax of three per cent. for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the city are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be, such net receipts, and the city tax shall be levied thereupon as above provided. And the tax hereinabove provided shall be in lieu of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof, in the same shall not be taxed in any other manner for any municipal purpose.

"13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners from one street to another,

the horses or mules attached thereto shall not be driven faster than a walk.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in
2686 cases of unavoidable necessity or accident, or when cars are near at stations.

(4) No car shall be left to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

(5) No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street, or to take on or to leave off passengers.

(6) The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when, by so doing, such injury may be averted.

(7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

(8) The conductors shall use proper diligence to prevent ladies or children under twelve years of age, from leaving or entering the cars while in motion.

(9) Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

(10) The cars after sunset shall be provided with signal lights.

(11) No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses, and at each end of the lines, and the stations nearest the passenger depots
2687 of other railway companies at which excepted stations they may stand a longer time.

"12. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid then the above grant shall not become operative to vest any rights, privileges of franchises whatsoever.

O. 63. P. December 10, 1866."

2688 Complainant offers in evidence the Title Page of the Printed Ordinances of the Town of North Des Moines, as follows:

"Revised Ordinances of the Town of North Des Moines. Incorporated 1880."

Objected to on the part of Respondent for the reason that it is incompetent, irrelevant and immaterial, and not rebuttal.

Complainant also offers from the said printed copy of the Revised Ordinances of North Des Moines, Chapter 24, at page 34, a certified copy of which has already been offered as Exhibit 19.

Counsel for Respondent interpose the same objection as last above made.

Chapter 21, as above offered, reads as follows:

"An ordinance authorizing the construction and operation of certain streets railroads in and along the streets of North Des Moines.

SEC. 1. Be it ordained by the Town Council of the Town of North Des Moines, that consent, permission and authority *is* hereby given and granted to and duly vested in the Des Moines Street Railway Company and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side tracks and switches, in, along and upon all the streets, and such alleys only fronting on which said company has depots, stables or car-houses, and over the bridges and on such streets in the town of North Des Moines, with their present
2689 and future connections and extensions, and authority is hereby given to said company, their successors or assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereafter mentioned and prescribed.

SEC. 2. The cars to be used on the tracks of the said Des Moines Street Railway Company shall be operated with steam power, such as used on street railways, and acceptable in other cities, or animal power, and no cars or carriages used on the tracks of any other company shall be used on the tracks of the said street railway.

SEC. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities, provided said company shall, at all times, have the right to use their track for transporting iron, ties or other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the town of North Des Moines and said Company.

SEC. 4. The tracks of said railway shall be laid so as to conform to the established grade of the streets on which the road may be built wherever the town has, or may have established such grades. Where streets are not graded said company may, if they desire, lay their tracks so as to conform to the surface of such streets, provided that they raise the same to grade whenever the town shall grade the same, or any part thereof, and in case said town of North
2690 Des Moines pave or otherwise improve the surface of any street along which such railway may run, said company shall pave or otherwise improve the space between the rails or track, so that it shall substantially correspond with the improvements of the street outside the track, provided said company shall plank the space between the tracks at each principal street crossing wherever required by the street committee.

SEC. 5. The said town of North Des Moines shall not be held liable to said company for any damage that may be occasioned by

the breakage of any gas or water pipes, or from any delay that may be occasioned by the construction of sewers, laying water or gas pipes, or the necessary repair of the same or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

SEC. 6. Said tracks shall be laid in the center of the streets in all cases where it is practical to so lay them and except where a double track is contemplated, in which case the tracks may be laid at such a distance from the center of said street as will make the center points between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon such alley as provided for in section one, a single track only shall be laid, and no sidetracks, switches or turn-outs, except in cases where turn-outs are used to connect tracks laid along and upon alleys with tracks along and upon streets, shall be allowed on any such alley, provided, however, that if said company shall have its depot, station, stable or car-houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into
2691 such depots, stations, stables or car-houses.

SEC. 7. The cars on any and every line or route of said railway in the town of North Des Moines, shall connect with a line or route extending at least to Walnut Street in the City of Des Moines, Iowa, and the rate of fare between the extreme terminus of any one route whenever such terminus shall hereafter be fixed in the City of Des Moines, and the town of North Des Moines, respectively, shall not exceed five cents, and no discrimination shall ever be made against any points in North Des Moines and in favor of any point in the City of Des Moines, Iowa, on the same route.

SEC. 8. The cars of said company shall be entitled to the tracks, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said town of North Des Moines, such team or vehicle shall give way to such car, nor shall any person wilfully or maliciously obstruct, hinder or interfere with any of said railway cars by placing, driving, stopping, or — to — placed or driven in a slow pace or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway or either of them, after being notified by the driver or conductor, by the ringing of the car bell or otherwise. And whosoever shall wilfully violate any of the provisions of this section shall upon conviction thereof before any magistrate of said town of North Des Moines be fined not less than five nor more than fifty dollars.

SEC. 9. This charter is granted, and the rights and privileges herein conferred, are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one-half mile of said railway as an extension of its present line
2692 on Ninth Street in the city of Des Moines, directly north on said Ninth Street to the North Corporation line of the town of North Des Moines fully completed and equipped, and cars running thereon by the first day of August, 1885; provided, however, if said company is delayed in the construction of said railway, by order

or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of each half mile of said railway. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of its railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon level with the surface of the floor of the bridges as near as practicable.

SEC. 10. The right herein granted to said company shall not operate to hinder the town of North Des Moines from chartering any other company for a like public service; and any company so chartered shall have equal rights to any street that may have been occupied by the Des Moines Street Railway Company for the distance of not to exceed seven hundred feet, provided that whenever any street shall be so used by more than one company, the company which shall be the last so to occupy the street, shall pay all the cost of so adjusting the tracks already laid as to give both companies said equal privileges.

SEC. 11. Said company shall annually on or before the first day of February of each year, after the year 1895, furnish to the Treasurer a statement of the net receipts of the Company for the year ending on the first day of January next preceding, which said
2593 statement shall be subscribed and sworn to by the Secretary and Treasurer of the company, and there shall be levied on such proportion of such net receipts as the whole number of miles of railway owned and operated by said Company in North Des Moines shall bear to the whole number of miles owned and operated by said company, a tax of three per cent. for municipal purposes, which tax at the same time shall be collected in the same manner as other taxes; and such tax, from the time of such levy shall be a lien upon the property and franchise of said company, in the same manner and to the same extent that other taxes levied by the town of North Des Moines are liens. If such sworn statement as above required, is not made and filed with the Treasurer within the time above prescribed, the Treasurer shall ascertain as nearly as may be such net receipts, and municipal tax shall be levied thereon as above provided; and the tax herein above provided shall be in lieu of all taxes and assessments for all municipal purposes upon the property of said company; and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof in the same shall not be taxed in any other manner for any municipal purpose. But prior to the year 1895 no taxes whatever for municipal purposes shall be levied upon the property of said company, or the right, property or interest of any person in the same. And in case any such tax for municipal purposes is so levied the town of North Des Moines agrees and undertakes to pay the same.

SEC. 12. The cars or carriages of the company shall be run upon and along the track of said railroad in conformity with the following rules and regulations, to-wit:

I. No car shall be run at a greater rate of speed than
2694 six miles per hour.

II. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

III. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in case of unavoidable necessity, or accident, or where cars are near stations.

IV. No cars shall be left to remain standing on any street at any time unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

V. No car shall be allowed to stop on a cross walk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street, or to take on or leave off passengers.

Sec. VI. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when by so doing the injury may be averted.

VII. All proper cars shall be made by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

VIII. The conductors and drivers shall use proper diligence to prevent children under twelve years of age, or ladies from leaving or entering the car while in motion.

IX. Conductors or drivers shall announce to passengers in a distinct tone the names of all streets crossed, as the cars approach such cross streets and they shall observe the same rule when nearing the track of any other railway company.

2695 X. The cars after sunset shall be provided with signal lights.

XI. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the line and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

XII. Within thirty days from the publication of this ordinance said company shall file with the recorder of said town a written acceptance of the grants herein made, with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said Company, and when so accepted, this ordinance shall operate as a contract between the town and said company; and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatever.

O. P. May 9, 1885."

2696 The complainant offers in evidence the title to the printed book known as The Revised Ordinances of the City of Des Moines of 1889, as follows:

Respondent interposes the same objection last above made.

"The Revised Ordinances of the City of Des Moines of 1889. The Original Charters, Proceedings to Abandon the same, and General Incorporation Laws with Amendments and Additionals Thereto.

Compiled and Revised by I. A. Hammer and William Mathews. Approved by J. H. Detrick, City Solicitor, and Hugh Brennan, Assistant City Solicitor. Published by Authority of the City Council."

Complainant also offers from the said Revised Ordinances of 1880 Chapter 53, being the reenactment of the Turner franchise, which has already been offered as Exhibit 26, and which is as follows:

Respondent interposes the same objection last above made.

"CHAPTER 53.

On Street Railways.

"An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines.

O. 63. P. December 19, 1883.

"SECTION 1. Be it ordained by the City Council of the City of Des Moines: That consent, permission and authority is
2697 hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turnouts, sidetracks and switches in, upon and along all the streets and such alleys only fronting on which said company have depots, stables, or car-houses, and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.

"SEC. 2. The cars to be used upon such tracks shall be operated with animal power only, and shall not connect with any other railway, on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

"SEC. 3. Said tracks and railway shall be used for the purpose of transporting passengers and their ordinary baggage, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities; provided, said company shall at all times have the right to use their track for transporting iron, ties, and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Des Moines and said company.

2698 "SEC. 4. The track of such railway shall be laid so as to conform to the established grades of the streets on which the road may be built, wherever the city has or may establish such grades; where the streets are not graded, said company may, if they

desire, lay their tracks so as to conform to the surface of such streets: provided, that they may raise the same to the grade when the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street, along which such railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks, so that it shall substantially correspond with the improvements of the street outside of the track; provided, said company shall plank the space between the tracks at each principal street-crossing whenever required by the Mayor.

"SEC. 5. The said city of Des Moines shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

"SEC. 6. Said tracks shall be laid in the center of the streets in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which case the tracks may be laid at such distance from the center of said street as will make the center point between the two tracks the center of the street, and said tracks shall not be laid within twelve feet of the sidewalk upon any
2699 street in any case where it is practicable to be avoided, and where any line of railway shall be extended along and upon any such alley, as provided for in section one, a single track only shall be laid, and no sidetracks, switches, or turn-outs, except in cases where turnouts are used to connect tracks laid along and upon alleys with tracks laid along and upon streets, shall be allowed on any such alley; provided, however, that if said company shall have its depot, stations, stables, or car houses on any lot fronting on such alleys, they shall have the privilege of laying down turn-out tracks leading from such alleys into such depots, stations, stables, or car house.

"SEC. 7. The rate of fare upon any one line or route of railway shall not exceed ten cents for each passenger for any distance on such route for five (5) years after the completion of the first mile of track, and thereafter shall not exceed the rate of six cents for any one route.

"SEC. 8. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person willfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle, or other obstacle in, upon, across, along, or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell, or otherwise, and whoever shall willfully violate any of the provisions of this section shall, upon conviction thereof before the Police Judge of said city, be fined in any
2700 sum not less than five nor more than fifty dollars.

§9 is O. 131. P. February 5, 1872.

"SEC. 9. This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications, only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D. 1872, unless the City Council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and revert to the city of Des Moines. Provided, that if said company is delayed in the construction of said railway by order or injunction of any court or judge thereof, the time of such delay shall be given to said company over and above the time given by this section for the completion of such given number of miles of said company. Provided, that in case any such injunction or order of court or any judge, is procured upon the application of any party other than the city of Des Moines, said company shall immediately notify the Mayor and City Solicitor of such injunction or order; and thereupon the Mayor shall appoint the City Solicitor to resist such injunction or order, and to obtain a dissolution of the same, or to assist the attorney of said company. Said company shall pay all expenses that may accrue by reason of such suit or suits, and unless such notices — the
2701 time of continuance of such order or injunction shall not be so given to said company. The foregoing extension of time for the construction of said railway is granted upon the express condition that said company, in the construction of their railway upon all bridges upon which the same may run, shall so construct the same that the top surface of the rails of said railway shall be even with and upon a level with the surface of the floor of the bridges as near as practicable.

"SEC. 10. The right herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant or to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"SEC. 11. After the year A. D. 1875, whenever there may be any fair grounds, or any other place of public resort in or near the suburbs of the city, to or near which the said railway company shall have no track laid connecting the same by a direct route with some central part of the city, or with some other route running into some central part of the city, and it may be deemed for the public interest to have a street railway built to or near such fair grounds or other place of public resort, the City Council may, by a two-thirds vote, require said company to build such direct or connecting route; and if said company in such case fail or neglect to build such

route within one year from the time of being notified of such
2702 requirement to build such direct connecting route, then the City Council shall have power to grant such right to any other responsible company that may be ready to build and equip such direct or connecting route within the same time and run the same upon the same terms as the company to which this grant is made.

"SEC. 12. Said company shall annually, on or before the first day of February of each year, furnish to the City Treasurer a statement of the net receipts of the company for the year ending on the first day of January then next preceding, which said statement shall be subscribed and sworn to by the Secretary and Treasurer of the company, and there shall be levied on such net receipts a tax of three per cent for city purposes, which tax shall become delinquent at the same time and be collected in the same manner as other taxes; and such tax from the time of such levy shall be a lien upon the property and franchises of said company, in the same manner and to the same extent that other taxes levied by the city are liens. If such sworn statement as is above required is not made and filed with the City Treasurer within the time above prescribed, the City Treasurer shall ascertain as near as may be such net receipts and the city tax shall be levied thereupon as above provided. And the tax hereinabove provided shall be a lien of all taxes and assessments for all city purposes upon the property of said company, and of the right, property or interest of any person in the same, and the property and stock of said company, and the members thereof in the same, shall not be taxed in any other manner for any municipal purpose.

"SEC. 13. The cars or carriages of the company shall be
2703 run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit:

First. No car shall be run at a greater rate of speed than six miles an hour.

Second. While cars are turning corners from one street to another, the horses or mules attached thereto shall not be driven faster than a walk.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near *of* stations.

Fourth. No car shall be left to remain standing on any street at any time, unless a team is attached thereto, and the same is waiting for passengers or for other proper purposes.

Fifth. No car shall be allowed to stop on a cross-walk nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the street or to take on or leave off passengers.

Sixth. The conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track, the cars shall be stopped when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons and other vehicles.

Eighth. The conductors shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

Ninth. Conductors shall announce to passengers, in a distinct tone, the names of all streets crossed as the cars approach such cross
2704 streets, and they shall observe the same rule when nearing the track of any other railway company.

Tenth. The cars after sunset shall be provided with signal lights.

Eleventh. No car shall remain standing at any of the stations more than ten minutes, except at stations for watering horses and at each end of the lines, and the stations nearest the passenger depots of other railway companies; at which excepted stations they may stand a longer time.

"SEC. 14. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grants hereinabove named, with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company, and when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever."

Complainant offers in evidence Chapter 33 from the printed copy of the Ordinances of North Des Moines, which has already been referred to, and which has already been offered in evidence as Exhibit No. 32.

Objected to on the part of respondent for the reason that it is incompetent, irrelevant and immaterial, and for the further reason that the complainant in this case could not acquire any rights thereunder that would be binding upon the defendant, and for the further reason that any rights granted by said ordinance have by operation of law been extinguished and are of no force and effect.

2705 Said chapter 33 is as follows:

"CHAPTER XXXIII.

"An Ordinance authorizing the Broad Gauge Street Railway Company to construct and operate street railroads in the incorporated town of North Des Moines.

"SEC. 1. Be it ordained by the town council of the town of North Des Moines, That consent, permission and authority is hereby given and granted to and vested in the Des Moines Broad Gauge Street Railway Company and its successors and assigns, to construct, equip, maintain and operate for the term of twenty-five years, upon the conditions hereinafter stated, a single standard four feet, eight and one half inches in width, street railway track along and over the streets, alleys and bridges of and within the town of North Des Moines, hereafter designated, and such other streets and alleys of said town as said company may select, with the consent and approval of said town, and to construct and use in connection therewith all

necessary and convenient tracks for turn-outs, side-tracks and switches along the streets and such alleys only fronting on which said company shall have depots, stables or car-houses, and in constructing and operating said railway, said company shall have the right to intersect or cross the track or tracks of any street or other railway.

"SEC. 2. The streets specifically referred to in section one hereof, are the following: Sixth street from the south line to north line of said town.

"SEC. 3. The cars to be used upon such tracks shall be of the best style and class used in other cities, and shall be operated
2703 by animal power, only, for ten years, and thereafter as the town council may direct. The tracks shall not connect with any other railway on which any other power is used, and no railway car or carriage used upon any railway operated by other than animal power shall be used upon any of said tracks during said ten years, and said tracks and cars shall be used for the purpose of transporting passengers and their ordinary luggage only, provided that said company shall, at all times, have the right to use said tracks for the purpose of transporting materials used by it in constructing, repairing and operating said road.

"SEC. 4. In the construction of said tracks, a train railway only shall be used, the width of which shall not be less than four feet eight and one-half inches from outside to outside, the width of the tram shall not be less than two and one-half inches horizontal. The height along the wheel edge, or from the rim to the highest part of the rail shall not be more than seven-eighths of an inch.

"SEC. 5. The tracks shall be laid so as to conform to the established grade of any street upon which the road may be built whenever the same has or shall be hereafter built, whenever the same has or shall be hereafter established. Where the streets are not graded, the tracks may be so laid as to conform to the surface of the street, and in case the town shall at any time pave or otherwise improve the surface of any street along which said railway may run, said company, at its own expense, shall pave or otherwise improve the space between its tracks so that it shall substantially correspond with the improvement outside its rails and tracks, and the top
2797 of the rail shall be level with the surface of the street or pavement, and said company shall plank the space between the tracks at each principal crossing whenever required so to do by the council, and to their satisfaction, and they shall restore all streets to as good condition as before the laying down of its tracks.

"SEC. 6. The town of North Des Moines shall not be held liable for any damages that may be occasioned by the breaking of any gas or water pipes, or for delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or the necessary repairing of the same, or from the improvements or repair of any street or streets.

SEC. 7. The tracks of the company shall be laid in the center of the street in all cases where it is practicable to so lay them, and except where a double track is contemplated, in which last case the tracks may be laid at such a distance from the center of said street

as will make the center point between the two tracks the center of the street; and said tracks shall not be laid within twelve feet of the sidewalk where the same can practically be avoided, and where any line of railway is laid along and upon any alley, as provided for in section one, a single track only, shall be laid, and no side-tracks, switches or turn-outs, except where turn-outs are used to connect tracks laid along alleys with tracks laid along streets, shall be allowed on any such alley, provided, that if said company shall have its depots, stables or car-houses on any lot fronting on such alley, they shall have the privilege of laying turnout tracks from such alley into such depots, stables, stations or car-houses.

"SEC. 8. The rate of fare shall not exceed five cents on
2708 any one fare from the extreme north end to the extreme south end of such line in or out of North Des Moines and the City of Des Moines, and a like fare from the extreme east end to the west end of said track in or out of North Des Moines and the City of Des Moines.

"SEC. 9. The cars of the company shall be entitled to the track and in all cases where a team or vehicle shall meet, or be overtaken upon the railway of said Company, such team or vehicle shall give way to such cars. No person shall willfully or maliciously obstruct, hinder or interfere with any of said railway cars, or property by placing, driving or stopping, or causing to be placed, or driven in a slow pace or stopped, any team, vehicle or substance in, upon across, along or on the track of said railway after being notified by the driver or conductor, by the ringing of the car bell or otherwise, and whosoever shall willfully violate any of the provisions of this section shall upon conviction thereof be fined in any sum not less than five dollars or more than fifty dollars.

"SEC. 10. The cars or carriages of the company shall be run upon and along the tracks of said railway in accordance with the following rules and regulations:

1. No car shall run at a greater rate of speed than ten miles an hour for the first two years, and not less than four miles an hour including stops.

2. While cars are turning corners the animals attached thereto shall not be driven faster than a walk.

3. Cars moving in the same direction shall not approach each other nearer than two hundred feet, except in cases of unavoidable necessity or accident or when near stations.

2709 4. Cars shall not be left standing on any street at any time unless a team is attached thereto, in charge of a man, and the same is waiting for passengers or any other proper purposes.

5. No car shall be allowed to stop upon a cross-walk or upon any intersecting street except to prevent collision, or to avoid danger, or to take on or leave off passengers.

6. The conductors and drivers employed by said company must use all reasonable care and diligence to prevent injury to persons or annoyance to passengers, and on the appearance of danger to any one on or near the track the cars must be stopped, if by so doing the injury can be avoided.

7. Reasonable care shall be used by conductors and drivers to prevent injury to teams, wagons, carriages and other vehicles.

8. Conductors and drivers shall use all proper diligence to prevent ladies, and children under twelve years of age from entering or leaving the cars while in motion.

9. Conductor shall announce to passengers in a distinct tone of voice the names of all streets crossed as the cars approach such cross streets and they shall observe the same rules when nearing the track of any railway company.

10. The cars after sunset shall be provided with signal lights.

11. Cars shall not remain standing at any of the stations more than ten minutes except at stations for watering horses and at each end of the lines, at which excepted stations they may stand a longer time.

12. Any snow or other matter removed from the track shall be removed from the street or so disposed of as not to interfere
2710 with travel.

13. Cars shall be run over the track each way, not farther apart than fifteen minutes, and the first car shall start from the north and west limits not later than six o'clock a. m. and the last car shall not reach said north and west limits earlier than eleven o'clock p. m.

Rule thirteen shall remain in force for the first ten years, and shall be subject to amendment thereafter by the council.

14. Said cars shall be warmed during the cold weather if demanded by the council.

"SEC. 11. In any litigation arising out of the grant herein given, the town shall not be liable for any costs or damages growing out of such litigation.

"SEC. 12. Unless said company shall be running cars as provided herein, within six months from the adoption of this ordinance; unless restrained by order of court or judge, in which event the time during which said restraining order is in force is not to be computed. Said council may declare said charter void.

"SEC. 13. Within thirty days after the passage of this ordinance said company shall file with the Recorder of the town of North Des Moines a written acceptance of the grant hereinabove made, with the conditions, regulations and limitations therein expressed, signed by the President and Secretary of said company, and upon failure to file such acceptance as aforesaid the above grant shall not become operative to vest any rights, privileges or franchises whatsoever in said company or its assigns.

"O. P. July 6, 1886."

2711 Complainant asks that the Examiner copy in full the ordinances referred to at pages 80, 81, and 83 of the transcript in this case as there offered.

Complainant offers in evidence Chapter 59 of the Revised Ordinances of 1889, from the printed Revised Ordinances already referred to, commencing on page 300 thereof, which has already been offered as Exhibit 126, as follows:

Objected to on part of respondent as being immaterial, incompetent and irrelevant, the same not being a grant of any rights to the complainant in this action.

"CHAPTER LIX.

Des Moines Belt Line Railway.

An ordinance granting to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway along and upon a certain street and to cross certain streets in the City of Des Moines.

O. 429. P. May 16, 1888.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there is hereby granted to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railway with a single track along and upon the east fifteen feet of First street, in said city, from Center Street to a point two hundred feet north of north line of Crocker street, and across such other streets in said city as may be necessary in the construction of its said road.

SEC. 2. The right-of-way granted in section one is upon the express condition that said Des Moines Belt Line Railway shall
2712 grade said street occupied by them at least twenty-five feet west of the west rail of their track to such grade as may be prescribed by the City Council.

SEC. 3. Whenever said street shall be paved or improved at the established grade thereon, said Des Moines Belt Line Railway Company shall bring that part of such street covered by its tracks to such grades, and shall pave and maintain three and one-half feet each way, commencing at the center of the space between the rails, and provide suitable crossings upon all streets, whether paved or not paved, crossed by said railway within the corporate limits of said city. And shall build all necessary culverts for drainage of water wherever necessary.

SEC. 4. The right-of-way herein granted is upon the express terms and conditions that the said Des Moines Belt Line Railway Company shall never use said street, or any part thereof, for general railroad purposes; nor shall said company grant or allow any other railway company to use its tracks for general railway purposes along or upon the street named. It is herein provided by the express provisions of this ordinance that the gauge of said Des Moines Belt Line Railway Company shall be four feet eight and one-half inches, and that the center of the rails of said railway shall not be west of the center of the right-of-way on said street herein granted.

SEC. 5. That said company shall have the right to propel its cars on its railway by steam or electric motor, but the speed thereof shall not exceed eight miles per hour upon any streets herein named within the corporate limits of said city; provided, that in construct-

ing said road said company may use an ordinary railway locomotive.

2713 SEC. 6. This ordinance shall not be construed as granting said Des Moines Belt Line Railway Company the right to lay down or maintain its track lengthwise upon any other street than the one named herein.

SEC. 7. Said Des Moines Belt Line Railway Company shall be liable for any and all damages resulting to persons or property on account of the construction, maintaining and operating said railway and to hold the city of Des Moines forever harmless from any and all damages that may result from granting the rights and privileges herein conferred. And said railway company shall be subject in the operation of its railway upon said street to such reasonable regulations as the Council may from time to time prescribe.

SEC. 8. Said Des Moines Belt Line Railway Company shall, while constructing and maintaining its railway, put up and erect at its own cost and expense, retaining walls on the west line of said street, at such points and places along such line as may be designated by the City Engineer and City Council, for the purpose of protecting property abutting on said street, the walls to be built and constructed with such material and in such manner as may be designated and directed by the City Engineer and City Council or Board of Public Works (in event of a Board of Public Works being established and in existence at the time said work is done), the work to be done under their supervision and direction. The walls so erected to be kept at all times in good repair by said railway company. In no event shall said walls be built, save and except upon the west line of said street.

2714 SEC. 9. In the event of the Des Moines Belt Line Railway Company, its successors or assigns, shall as now or hereafter constituted or named and within five years from the passage of this ordinance or at any time thereafter, cease to exist or operate said railway then and in that event, and upon a failure to operate said road for a period of sixty days, all rights and privileges herein granted shall from the date of its non-existence, or a failure to so operate, constitute a revocation of all the rights and privileges granted by this ordinance without further notice upon the part of the city; save and except that the revocation herein named shall not be absolute until this ordinance has been repealed by the City Council.

SEC. 10. The fare to be charged by said Des Moines Belt Line Railway Company shall not exceed five cents within the corporate limits of said city.

SEC. 11. The said Des Moines Belt Line Railway Company hereby agrees to complete said road and to have cars running thereon on or before one year from the date of the passage of this ordinance, and unless said road is completed and in operation by said time, all rights and privileges conferred under this ordinance shall be forfeited."

2715 Complainant offers in evidence Chapter 60 of the said Revised Ordinances of 1889, commencing on page 303 thereof, and which has already been offered as Exhibit 135, as follows: Respondent interposes same objection as last above made.

"CHAPTER LX.

Des Moines River Line Street Railway Company.

An ordinance granting to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets in the city of Des Moines.

O. 445. P. September 20, 1888.

SECTION 1. Be it ordained by the City Council of the City of Des Moines: That there be and is hereby granted to the Des Moines River Line Street Railway Company, its successors and assigns, the right to construct, maintain and operate a street railway, with single or double tracks and necessary turn-outs and switches, if a single track only is laid, along over and upon the following streets in said City, to-wit: Upon Commercial Street, from the east end thereof to west Second Street; upon Second street from the north line of Commercial street to Locust street; upon west Locust street from Second street to the east line of west Fourth street. And the said Des Moines River Line Street Railway Company is hereby authorized and empowered to use the tracks of the Des Moines Electric Railway Company, now laid between Second and Fourth streets on Locust street, upon making compensation therefor as provided in the ordinance granting said Electric Railway Company, or its grantor, the right to occupy the streets of said city. And the
2716 said Des Moines River Line Street Railway Company shall so run its cars upon the tracks of the said Electric Railway Company as not to unreasonably interfere with the use thereof by said last named company, and in no event shall any additional track be laid down upon Locust street between Second and Fourth streets by the Des Moines River Line Street Railway Company. And there shall not be laid on Second street between Commercial and Locust Streets more than two tracks, and any company having the right to do so and desiring to occupy said portion of Second street after said two tracks are laid shall use such tracks upon making compensation as herein provided. And there shall not be laid on Second street, between Commercial and Locust Street, more than the two tracks now allowed to the Des Moines Electric Railway Company. Provided, however, that the said two tracks may be laid by the said Des Moines River Line Street Railway Company. Provided, further, that this section shall not take effect until the written consent of the Des Moines Electric Railway Company thereto is filed with the City Clerk.

SEC. 2. The said Des Moines River Line Street Railway Company is hereby empowered and authorized to propel its cars by steam ap-

plied by the cable system, or what is known as noiseless steam motors. Provided, however, that this grant shall not be construed to infringe upon the vested rights of any other street railway company.

SEC. 3. The tracks of said railway company shall be used for no other purpose than to render a street railway service, and shall not connect with any other railway; and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks.

Provided, further, that this section shall not deprive other
2717 street railway cars from running over and along and upon said railway tracks: provided, that nothing in this section shall be so construed so as to prevent this company from running the motors and passenger cars of the Des Moines Belt Line Railway Company over their line as long as the said Des Moines Belt Line Railway Company is not carrying on a regular commercial railway business.

SEC. 4. If a noiseless steam motor be used for propel-ing the cars of said street railway company, or the cars used upon its said tracks, the fuel used by such motors shall be either anthracite coal, coke or such other fuel as will produce no smoke in its consumption.

SEC. 5. In the construction and operation of said company's railway along said streets, said company shall exercise all reasonable care so as not unnecessarily to interfere with or impede the public travel on said streets. All new tracks laid by said company shall be laid so as to conform to the established grade of the city, if the surface of the street has been brought to grade, and if not, then the track may be laid so as to conform to the surface of the street, and shall be brought by the company to grade when the city brings its streets, or any part ther-of, to grade free from expense to the city.

SEC. 6. The tracks of said company shall be laid in the center of said street except when a double track is contemplated or when some other company is or shall hereafter be authorized to lay a track on the same street, and in either of said last named cases the track shall be laid at such distance from the center of said street as that the center of said street shall be the same distance from the outer rails of each of said tracks, which distance shall be fixed and determined by the City Engineer as directed by the City Council. "And
2718 the Company owning or operating such other track shall, upon the application of said Des Moines River Line Street Railway Company, at its expense, remove its tracks to such point as *may* be designated by the City Engineer, and approved by the City Council, so that the two tracks may be an equal distance from the center of the street. And if within five days after such application is made such track is not so removed, then the Mayor shall order it to be so removed and laid by the City Marshal/ at the expense of the Des Moines River Line Street Railway Company. Provided further, that if any other street railway company shall hereafter be granted the right to lay its tracks upon any part of said street upon which said Des Moines River Line Street Railway Company, or its assigns, shall have a track, or tracks, of its railroad then laid or acquired, it shall on demand of said other company remove its track or tracks

to such distance from the center line of said street as that the center line of said street shall be an equal distance from the outer rail of said two roads when built; provided, however, that before it shall be required to make said removal the company desiring the same shall pay or tender the cost of making such change. And if upon such demand and tender of the cost of such removal the same shall not be made within thirty days, then such tracks shall be removed and relaid by the City Marshall, under the supervision of the City Engineer, at the cost of the Company desiring such change. Provided, however, that there shall not be more than two tracks of any railroad laid on any part of said street except for the necessary switches and turn-outs nor shall said tracks be laid within twelve feet of the sidewalk on said street except at points where turn-outs are necessary for the convenient operation of the road for
2719 reaching its stations, car houses and shops.

SEC. 7. The cars to be used upon such tracks by said company shall be of the best style and class used in other first class cities, and shall not be less than seven feet in width and shall be at least sixteen feet long, including the platform thereof, and all motors used thereon for propelling the cars of said company shall be of the most approved make and pattern, and shall be what are termed noiseless motors. And the gauge of said tracks shall be four feet, eight and one half inches, and shall be laid with a five inch tram rail upon all streets.

SEC. 8. This grant shall be subject to all the rights of the water and gas companies and street railway companies, under grants heretofore made to them by the City of Des Moines, and said city shall in no way be held liable to said company or its assigns for any outlay or damage caused to said Des Moines River Line Street Railway Company by the construction or repairing of sewers, repairing or rebuilding of bridges, grading and repairing the streets on which such railroad track is laid; provided, the same is done in a reasonable and careful and expeditious manner, or damage resulting from the laying, repairing or breaking of any water or gas pipes thereon.

SEC. 9. The rates of fare charged by said company shall not exceed five cents for each person carried in the same direction between any two points within the city limits on any one route; provided, that such passage shall be continuous; provided, children under six years shall go free if accompanied by their parents.
2720 SEC. 10. The cars of said company shall be entitled to the track; and in all cases where any team or vehicle shall meet or be overtaken by the cars of said company, upon the railway track of said company, such team or vehicle shall give way for such car promptly after being notified by the manager or conductor, by the ringing of the bell or otherwise; and should the person or persons in charge of such team or vehicle wilfully violate the provisions of this section, they shall, upon conviction thereof before the Police Judge of said City, be fined not less than five or more than twenty-five dollars.

SEC. 11. In the construction of its railway upon or over all bridges or viaducts upon the street or streets along which the same may run, said company shall so construct the same that the top surface of the

rails of said railway shall be on a level with the surface of the floor of the bridge, and on all paved streets the top surface of the rail shall be on a level with the surface of the paving, and in case the city at any time shall pave or otherwise improve the surface of any street along which said railway may run said parties, or their assigns, shall at their own expense pave or otherwise improve the street or streets along where said street railroad company lay their track or tracks as provided by law; namely, to pave and maintain the pavement three and one-half feet each way from the center of their tracks, and that it shall substantially correspond with the improvement of the street outside of the rails and track. When the tracks are laid upon a street already paved the said parties, or their assigns, shall deposit with the Treasurer, on estimate of the City Engineer, before paving is removed, a sufficient amount of money to
2721 cover said estimate for the paving within the rails, and said parties or their assigns, shall plank the space between the track at each principal crossing, whenever required by the City Council, and to its satisfaction, and they shall restore all streets, whether paved or not, to as good condition as before the laying down of their tracks.

SEC. 12. A failure from any fault of said company to use and track or tracks so constructed, and run cars thereon, on any street or part of street, for a period of thirty days, shall be deemed the abandonment of such street or part of street by said company, or its assigns, and the City Council may by resolution declare such street or part of street abandoned, and require the said company, or its assigns, to remove their track or tracks from such street or part of street, and upon failure or refusal of said company to remove such track or tracks, when notified to do so, the City Council may cause the same to be removed at the expense of said company or its assigns.

SEC. 13. In constructing, repairing and operating said street railway said company shall use every reasonable and proper precaution to avoid damage or injury to persons or property and shall at all times respond to the city of Des Moines for, and save it harmless from all and every damage, injury, cost or expense caused or occasioned by reason of any act of said company's officers, or employés, in the construction, reconstruction, repairing or operating of said street railway, or in paving, repaving or repairing of said street or by reason of any and every act done under the provisions of this ordinance.

SEC. 14. The said company, or its assigns, shall commence work on their line within two months from the acceptance of the
2722 terms and conditions of this ordinance, and shall have its tracks completed and cars running thereon within twelve months from the date of said acceptance.

SEC. 15. The City of Des Moines expressly reserves the right to allow and permit any street railway company to run its cars over and along the tracks, switches and turnouts of said road to be constructed under this ordinance, on said parts of said streets, for the distance of three blocks or less, on such terms and for such compensation as may be agreed upon by the companies interested; and in

case of dis-greement, then the same to be settled by arbitration—one chosen by each of said companies, and the two chosen to select a third, and the persons thus chosen shall decide upon the terms and what would be a reasonable compensation as to the use of such road and such terms and conditions are expressly consented to by the said company.

SEC. 16. The slot rails used by said company in the construction and maintenance of said road, if it shall be constructed as a cable railroad, shall be constructed and placed so that the slot between said rails for the accommodation of the grip arm shall not exceed in width three-fourths of an inch, and shall be so constructed as to present a flat and even surface, and the upper surface of said slot rails, adjoining said slot shall not be made beveling, but shall be made flat and square so as to prevent the wheels of carriages and other vehicles, and the caulks of shoes on horses or other animals from dropping into and catching on said slot while passing along or over the same.

SEC. 17. The cars or carriages operated by said company, or its assigns, shall be run along and upon said railway in conformity with the following rules and regulations, to-wit:

2723 First. No car shall run at a greater rate of speed than six miles an hour in the thickly settled portion of the city nor more than ten miles an hour elsewhere.

Second. While cars are turning corners from one street to another they shall not run at a greater rate of speed than four miles an hour.

Third. Cars traveling in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable accident or when cars are near stations, or where they should be coupled together.

Fourth. No car shall be left standing upon any street at any time, unless the same is waiting for passengers or for other purposes.

Fifth. No car shall be allowed to stop upon or over a cross-walk at intersecting streets, except to prevent a collision, or to avoid danger to persons in the street, or to take on or leave off passengers.

Sixth. Conductors shall announce to passengers, in a distinct tone, the names of all street crossings as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any railway other than a street railway company.

Seventh. Cars after sunset shall be provided with signal lights.

SEC. 18. The rights and privileges hereby conferred upon the company are upon the express terms and conditions that any judgment that may hereafter be obtained against said company, or assigns, for any injury to any person or property on account of the construction or operation of said railway, shall be a lien upon all the property of said company, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed by said company.

2724 SEC. 19. The City Council reserves the right to adopt from time to time, and to compel compliance therewith, other reasonable rules and regulations.

SEC. 20. Within six days from the passage of this ordinance said

company shall file with the City Clerk a written acceptance of the grant herein named, of the conditions, regulations and limitations thereof, signed by the duly authorized officers of said company.

SEC. 21. After the expiration of ten years from the passage of this ordinance, the said company shall pay annually to the city of Des Moines five per cent. of its net earnings as consideration for the rights and privileges herein granted, but nothing herein shall be construed as exempting said Des Moines River Line Street Railway Company from taxation the same as other property subject to taxation.

SEC. 22. The City Council reserves the right after six months from and after the steam motors have first commenced running upon the streets covered by this ordinance, should the same become unreasonably dangerous to public safety, to order the discontinuance of said motors upon the streets named in this ordinance."

2725 Complainant offers in evidence Ordinance No. 1214 from the printed book entitled, Ordinances of the City of Des Moines, at page 25 thereof, the same being the ordinance already offered as Exhibit 196. The offer is from the annual additions to the printed ordinances of the City that have been printed and published by the City of Des Moines from 1900 to 1906, with the exception of one year when they did not print them.

Objected to on part of respondent as being irrelevant and immaterial.

Said ordinance is as follows:

"*Ordinance No.* 1214.

"An ordinance to amend ordinance No. 1017, passed November 14, 1899, entitled 'An ordinance to regulate, license and tax house movers, and prescribe rules and regulations governing the moving of houses and buildings upon, along, across or near any street, avenue, highway or alley of the city, and to prescribe penalties for a violation thereof.'

"Be it Ordained by the City Council of the City of Des Moines:

"SECTION 1. That Section 7, of Ordinance No. 1017, passed November 14, 1899, being Section 701 of the Revised Ordinances of 1900 of the City of Des Moines, be and the same is hereby amended so as to read as follows:

"SEC. 7. No permit shall be issued for carrying or transporting any house or other building, over, along, upon or across any street, avenue, highway, or alley, within the following described limits, to-wit:

2726 "Commencing on the bank of the Des Moines river at the center of Vine Street, thence west along the center of Vine street to the West line of Seventh street, thence northerly along the west line of Seventh street to the north of High street, thence easterly along the north line of High street, and the said north line produced, to a point on the bank of the Des Moines river where the said north line of High street, if produced would intersect the said

bank, thence southerly along the right bank of the Des Moines river to the place of beginning.

"And all of that portion of the City of Des Moines lying east of the Des Moines river within the following described limits, to-wit:

"Commencing as a point on the center line of the alley running east and west between Grand avenue and Des Moines street where the west line of Third street, if produced northerly, would intersect the said center line of said alley, thence running easterly along the center of said alley to a point where the east line of Seventh street, if produced northerly would intersect the said center line, thence southerly along the east line of Seventh street produced and the east line of Seventh street to the center of Block "G" of Griffith's Addition to the City of Des Moines, thence westerly along the center line of Blocks "F," "C" and B" of Griffith's Addition produced, to the center of Fourth street, thence southerly along the center of Fourth street to the center of the south alley running east and west between Walnut street and Court avenue, thence westerly along the center of said alley to the west line of Third street, thence northerly
2727 along the said west line of Third street and said west line produced, to the place of beginning.

"It shall be unlawful for any person, firm or corporation, to move any house or building upon, along, across or over any street, avenue, highway, alley, or sidewalk within the above described limits. No permit shall be issued to carry or transport any house or other building over, along, across or upon any street, avenue, highway, alley, or sidewalk outside the above described limits, if such carrying or transporting shall render necessary the cutting or injury of any trolley wire, or any telephone or electric cable, including street railway feed cables, maintained at an elevation of thirty feet.

"No permit shall be issued for carrying or transporting any house, or other building, over or across any bridge, nor for moving or carrying any brick or stone house a distance of more than three hundred feet upon, along, or over any paved street, nor for carrying any building upon, along, or across any street railway track, during the hours when the cars run, except upon the written consent of the company owning such track, which consent must be filed with the application. Nor for the removal or carrying of any building upon, along, or over any street which shall be unsafe, or which will occasion permanent injury to the pavements, or electric poles, or wires, or which will unreasonably obstruct any street or public way, or injure private property. Nor shall any permit be issued except for work to be done by a person, firm or corporation duly licensed as in this ordinance provided.

"SEC. 2. That Section 11, of Ordinance No. 1017, passed November 14, 1899, being Section 705 of the Revised Ordinances
2728 of 1900, of the City of Des Moines, be and the same is hereby amended so as to read as follows:

"SEC. 11. If any person, firm or corporation shall in any application for a permit filed under the provisions of Section 6 of this ordinance make any untrue or false statements, the license of such person, firm or corporation to engage in the business of house moving in this city, shall be revoked by the City Treasurer.

"Any person, firm or corporation, who shall engage in the business hereinbefore described without first procuring a license therefor, or who shall move, raise or lower any house or building, without procuring a permit therefor, when a permit is required, or shall otherwise violate the provisions of this ordinance, shall, upon conviction thereof, be fined not less than $10, nor more than $100.

"SEC. 3. All ordinances and parts of ordinances inconsistent herewith are hereby repealed.

"SEC. 4. This ordinance shall be in full force and effect from and after its passage and publication as provided by law.

"Passed May 28, 1903. Approved June 4, 1903.

J. M. BRENTON, *Mayor.*

"Attest:

E. R. BENNETT,
City Clerk.

"I, E. R. Bennett, City Clerk of the City of Des Moines hereby certify that the above and foregoing Ordinance No. 1214, was passed by the City Council of the City of Des Moines at a meeting held May 28, 1903, and approved by the Mayor June 4, 1903.

E. R. BENNETT,
City Clerk.

"Published as provided by law June 26, 1903."

2729 Complainant offers in evidence from the same printed ordinances, Ordinance No. 1216, which has already been offered as Exhibit 198, and which is found on page 30 of said printed ordinances.

Objected to on part of respondent for the reason that it is immaterial, irrelevant and incompetent, and for the further reason that the City Council of the City of Des Moines had no right or power to grant the privileges attempted to be granted in said ordinance, and for the further reason that it is not shown to have been published and enacted as required by the statutes of the state governing the passage and enactment of ordinances.

Said ordinance is as follows:

"Ordinance No. 1216.

"An ordinance amending ordinance No. 711, passed February 4th, 1895, and entitled, 'An ordinance authorizing the Des Moines City Railway Company to use its railway tracks and cars for carrying the United States mail, express and freight, and for carrying material for the construction and operation of its roads,' by repealing sections two (2), three (3), and four (4) thereof, and enacting substitutes for said repealed sections; and providing for the operation of interurban cars over the tracks of said Des Moines City Railway Company.

"Whereas, the Des Moines City Railway Company now maintains and operate- certain tracks over which it is entitled among
2730 other thing- to haul freight, including the track from Walnut street to Locust street on West Front or Water street: and

"Whereas, it is desired, on account of the location of the City Library, to secure the removal of said track from West Front or Water street between Walnut and Locust streets; and,

"Whereas, It will be for the benefit of the general public to have said track removed from said space in front of the site of the City Library building; and

"Whereas, the said Des Moines City Railway company has agreed to remove its track from West Front or Water street between Walnut and Locust streets, and to relinquish its rights in that portion of said West Front or Water street which lies between Walnut and Locust streets, said agreement, however, being upon express condition that this ordinance be first legally enacted and approved so as to vest in said Des Moines City Railway Company the rights granted by this ordinance before any relinquishment by said company of any of its rights in said portion of said Front or Water street.

"Be it Ordained by the City Council of the City of Des Moines:

"SECTION 1. That sections two (2), three (3), and four (4) of said Ordinance No. 711, passed February 4th, 1895, entitled 'An ordinance authorizing the Des Moines City Railway company to use its railways, tracks and cars for carrying the United States mail, express and freight, for carrying material for the construction and operation of its roads,' be and the same are hereby repealed.

"SEC. 2. That there be enacted in lieu of said section two (2) of said Ordinance No. 711, passed February 4th, 1895, the following:

2731 "The said company is further authorized to carry freights over the following lines of its roads, to-wit:

"Its belt line, and river line, and Sevastopol line, and the connection of said lines, which connection shall be made by extending its line from the Sevastopol line north along the east side of West Front or Water street to the north line of Walnut street and westerly from its line on Front street along Court Avenue to west Second street, thence northerly along West Second street to Commercial street, thence easterly along Commercial street to where it intersects said belt line and river line railway at or near the dam across the Des Moines river.

"And it is further authorized to haul freight over and along such extensions of its said belt line as may be made to various industries now or hereafter situated in the north portion of the city, including the Iowa Brick Company's plant and the Flint Brick Company's plant, and also over and along such extensions as may be made from said Sevastopol line. Said company may run switches from said line on West Front street and Water street, west into the several alleys running west therefrom, and haul freight over the same, provided said switches shall not run further west along such alleys than West Second street, and said switches shall be laid with the consent of the parties owning property abutting on that portion of said alleys in which said switches may be laid. They may also lay down and operate switches from the line contemplated on West Second street into the alleys on the east side of Second street, and haul

freight over the same, with the consent of the persons own-
2732 ing property abutting on that portion of said alleys in which said switches may be laid.

"SEC. 3. That there be enacted in lieu of section 3 (3) of said Ordinance No. 711, passed February 4, 1895, the following:

"Said company shall also have the power to haul freight over and along the lines of its road running from said connecting line to its power house, which lines run along Grand avenue to East Second street, thence north on East Second street to Maple street, thence east on Maple street to East Fourth street, thence north on East Fourth street to its said power house. It may also run switches from the same through the alleys crossing the same, provided persons owning property abutting on that portion of said alleys which shall be occupied by said switches shall consent thereto, and it may also connect with the several railways crossing its railway.

"And it is further provided that the trains hauling freight along the said lines shall not consist of more than one motor car and two other cars unless the Council shall by resolution hereafter authorize longer trains to be hauled over said lines.

"SEC. 4. That there be enacted in lieu of section four (4) of said Ordinance No. 711, passed February 4, 1895, the following:

"The said company shall annually, on or before the fifteenth day of December of each year, furnish to the City Treasurer a statement of the gross receipts of the company arising from the carrying of mail, express matter and freight for the year ending the first day of December of that year, which statements shall be subscribed and sworn to by the Secretary and Treasurer of the said City Railway Company, and as a consideration for the privileges herein
2733 granted, the said company from the date of the acceptance of this ordinance, shall pay into the treasury of the City of Des Moines a sum equal to five per cent. of such gross receipts, said payment to be made by the said company on or before the first day of January Immediately following the making of the report above required.

"SEC. 5. That this ordinance shall not restrict the operation of passenger cars of interurban railway companies over the tracks of said Des Moines City Railway Company, or the transportation over said tracks of such parcels, packages, baggage, mail and express as may be carried in passenger or combination baggage cars of interurban railway companies; and the Des Moines City Railway Company shall be, and is hereby expressly authorized, to operate, or to permit others to operate, over its tracks, including those tracks not along or in the streets described in this ordinance, as well as those in the streets herein described, the cars of any interurban railway company for transporting passengers, mail baggage, and such parcels packages, and freight, as it may carry in its passenger or combination cars only.

"SEC. 6. This ordinance shall operate as a contract between the city of Des Moines and the said Des Moines City Railway Company, its lessees, successors and assigns, upon the grants herein made being accepted in writing by the said railway company within

thirty days after the passage of this ordinance, and upon the payment of said railway company of the cost of publication thereof.

"SEC. 7. The Des Moines City Railway Company agrees to remove that portion of the track between Court avenue and Walnut street on West Water street or Front street in the event the
2734 city and the United States Government desires the removal of said track.

"Passed June 8, 1903. Approved July 11, 1903.

J. M. BRENTON, *Mayor.*

"Attest:

E. R. BENNETT,
City Clerk.

"I, E. R. Bennett, City Clerk, of the City of Des Moines, hereby certify that the above ordinance No. 1216, was passed by the City Council of the City of Des Moines at a meeting held June 8, 1903, and approved by the Mayor June 11, 1903.

E. R. BENNETT,
City Clerk.

"Published in Des Moines Daily News June 12, 1903."

Complainant offers from the same book Ordinance No. 1232, as shown at page 61 thereof, which has already been offered as Exhibit 204.

To which offer the respondent interposes the same objection last above made.

Said ordinance is as follows:

"*Ordinance* 1232.

"An ordinance to prevent accidents at the street car waiting room.

"Be it ordained by the City Council of the City of Des Moines:

"SECTION 1. That it shall be unlawful to move any automobile, bicycle or other vehicle, or any animal, at greater— than four miles an hour on West Sixth avenue between Walnut street and Mulberry street and on Mulberry street between Sixth avenue and Seventh street.

"SEC. 2. The penalty for a violation of this ordinance
2735 shall be a fine of not less than five dollars nor more than one hundred dollars, or imprisonment not less than five days, nor more than thirty days.

"SEC. 3. This ordinance shall take effect and be in force from and after publication.

"Passed September 8, 1903. Approved September 10, 1903.

J. M. BRENTON, *Mayor.*

Attest:

E. R. BENNETT,
City Clerk.

"I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify that the above Ordinance No. 1232, was passed by the City Council at a meeting held September 8, 1903, and approved by the Mayor September 10, 1903.

E. R. BENNETT,
City Clerk.

"Published, as provided by law, October 13, 1903."

Complainant offers from the printed book entitled, Ordinances of the City of Des Moines, Iowa, and covering the year 1904, Ordinance No. 1282, at page 51 thereof, which has already been offered as Exhibit No. 215.

To which offer respondent interposes the same objection last above made.

Said ordinance is as follows:

"*Ordinance No.* 1282.

"An ordinance, to amend ordinance No. 647, the same being Chapter 1 of Title XIII of the Revised Ordinances of the City of Des Moines, and entitled 'An ordinance to regulate electric wires,
2736 and the poles and fixtures therefor, and to prescribe the place where and the manner in which the same shall be erected upon and along the streets and alleys of the City of Des Moines."

Be it ordained by the City Council of the City of Des Moines:

SECTION 1. That Section 2 of Ordinance No. 647, the same being Chapter 1 of Title XIII of the Revised Ordinances of the City of Des Moines, and entitled "An ordinance to regulate electric wires and prescribe the place where and the manner in which the same shall be erected upon and along the streets and alleys of the City of Des Moines," be and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 2. That poles carrying electric wires upon and along the streets shall not be placed less than one hundred and twenty feet apart on the same side of the street, except that poles carrying the wires of electric street railways may be placed not less than one hundred feet apart on the same side of the street, and where placed on both sides of the street shall be opposite each other; and, as far as possible, wires carrying heavy electric currents shall be placed on one side of the street and those carrying light currents shall be placed on the other side of the street. No such pole shall be placed opposite the entrance of any building, nor so as to unnecessarily obstruct the travel upon the streets, nor unnecessarily interfere with the use of areas and vaults and other structures in the streets. Said poles shall be placed on the inside or sidewalk side of the curb, but shall not extend into any sidewalk more than twelve inches from the inside of the curb, and any excess in the thickness of the
pole shall extend into or through the curb. Provided, that
2737 all wires placed on all such poles, except the wires of electric street railways, shall not be less than thirty feet within the fire limits, from the surface of the ground.

SEC. 3. This ordinance shall be in full force and effect from and after its passage and publication according to law.

Passed September 19, 1904.

Approved September 20, 1904.

G. W. MATTERN, *Mayor.*

Attest:

N. B. VERTREES,
City Clerk.

I, N. B. Vertrees, City Clerk of the City of Des Moines, hereby certify that the foregoing ordinance, No. 1282 was passed by the City Council of the City of Des Moines, Sept. 19, 1904, approved by the Mayor, Sept. 20, 1904, and published as provided by law in the Register and Leader, Sept. 21, 1904.

N. B. VERTREES,
City Clerk.

Published as provided by law, October 5, 1904."

Complainant offers from the printed book, entitled, "Ordinances of the City of Des Moines, Iowa, passed since the publication of the Revised Ordinances of 1901, and published by authority of the City of Des Moines, Ordinance No. 1129 at page 19 thereof, which has already been offered as Exhibit 228.

To which offer the Respondent interposes the same objection as last above made.

Ordinance No. 1129 is as follows:

"*Ordinance No.* 1129.

An ordinance establishing the grade of Clark street from Twenty-seventh to Thirteenth street.

2738 "Be it Ordained by the City Council of the City of Des Moines:

SECTION 1. That the grade of Clark street from Twenty-seventh street to Thirtieth street be and it is hereby established above City datum as follows, to-wit:

At Twenty-seventh street, north curb, 155.00 feet.

At Twenty-seventh street, south curb, 155.50 feet.

At a point 300 feet west of Twenty-seventh street, 159.25 ft.

At Thirtieth street, 177.50 feet.

SECTION 2. This ordinance shall take effect and be in force from and after its passage and publication as provided by law, and shall not be changed without the consent of the abutting property owners and the Des Moines City Railway Company.

Passed June 27, 1901.

Approved June 28, 1901.

J. J. HARTENBOWER, *Mayor.*

Attest:

E. R. BENNETT,
City Clerk.

I, E. R. Bennett, City Clerk of the City of Des Moines, hereby certify, that the above ordinance, No. 1129, was passed by the City Council at a meeting held June 27, 1901, and approved by the Mayor June 28, 1901.

E. R. BENNETT,
City Clerk.

Published as provided by law, July 6, 1901."

2739 Mr. GUERNSEY: Complainant asks to have the Examiner mark the Revised Ordinances from which the various ordinances have been offered, as follows:

The Revised Ordinances of 1869 which have been referred to are identified as "Complainant's Exhibit No. 231."

The Revised Ordinances of 1874 which have been referred to are identified as "Complainant's Exhibit No. 232."

The Revised Ordinances of 1879 which have been referred to, are identified as "Complainant's Exhibit No. 233."

The Revised Ordinances of 1889, which have been referred to, are identified as "Complainant's Exhibit No. 234."

The Revised Ordinances of 1903, which have been referred to, are identified as "Complainant's Exhibit No. 235."

The printed Ordinances of 1904, which have been referred to, are identified as "Complainant's Exhibit No. 236."

The Ordinances of 1901, which have been referred to, are identified as "Complainant's Exhibit No. 237."

The Revised Ordinances of the Town of North Des Moines, which have been referred to, are identified as "Complainant's Exhibit No. 238."

2740 The respondent moves to strike from the record that part and portion of Exhibit 231 as offered and identified by the complainant, for the reason that it is not shown that said exhibit is published under authority and by the direction of the City of Des Moines, and is not properly identified therein, or by itself, or in any other manner as required by law, and the respondent interposes the same objection to each exhibit as identified, and moves to strike out that part and portion thereof which has been introduced and inserted in the record from said Exhibits Nos. 231 to 238, both inclusive, and each thereof, for the same reason stated in this motion.

Mr. M. T. GUERNSEY re-called, testified as follows:

Examined by W. L. READ, Esq.:

Int. 1. Mr. Guernsey, directing your attention to the exhibits, numbers 231 to 238, inclusive, I wish you would state what information you have with respect to what they are, whence you received them, and what you know with respect to whether they are what they purport to be, whether they were published, circulated and recognized for what they purport to be; state fully your information in respect thereto.

Respondent objects to the inquiry as being incompetent, irrele-

vant, immaterial, and for the further reason that the witness has not shown himself competent to testify concerning the matters inquired about.

(Question continued:) In connection with your statement I wish you would state the source of your knowledge and extent of it.

2741 Respondent interposes the same objection last above made, and for the further reason that the *inde*tification of the instruments inquired about and of the ordinances inquired about cannot be proved in the manner sought to be pursued in this inquiry.

Answer. With reference to Exhibit 231, the Ordinances of 1869, Exhibit 232, the Ordinances of 1874, and Exhibit 233, the Ordinances of 1879, I have no personal knowledge as to whether they were published under authority of the City. I know that they have been in common use here among the lawyers of the city for over twenty years as publications authorized and made by the City and as authentic compilations of the Revised Ordinances of those various dates.

Int. 2. Do you know whether they were put in circulation by the city as such or not?

Respondent moves to strike this evidence from the record for the reasons stated in the objection to the inquiry, and for the further reason that the statement of the witness is a statement of an opinion and a conclusion, and not a statement of fact.

(Question continued). The question is whether these publications are circulated and handed out by the City and City officials, if you know?

Respondent interposes same objection made to the former inquiry.

Answer. Limiting it to the exhibits that have been identified, they are not circulated or handed in these days, and have not been in the last twenty odd years, to my knowledge. They have been scarce, and are out of print, and these were in the office when I went into it in 1883 or 1884. Going on to answer your original ques-
2742 tion, the North Des Moines Ordinances, marked Exhibit 238, have been accepted as the ordinances of North Des Moines, and I believe, I know that that is the only copy of the ordinances of that town that was ever gotten out by the town and published in book form. I have had this a good many years and had it bound for the purpose of preservation.

Respondent moves to strike this evidence from the record for all the reasons urged in the former motion to the evidence of this witness.

(Answer continued). With reference to the Ordinances of 1889, marked Exhibit No. 234, I know that these were published and distributed by the City of Des Moines, and I think I remember obtaining this copy from the City years ago.

Respondent moves to strike this evidence of the witness from the

record for all of the reasons embodied in the motion heretofore urged as to the other evidence of this witness.

(Answer continued). In reference to Ordinances of 1903, 1904, and 1901, these I know are annuals that have been gotten out by the City and have been distributed and circulated by the City. I recently had them bound together as they were gotten out in pamphlet form, and my recollection is that one or more of these annuals was furnished to me at that time by Mr. Brenner, the City Solicitor, so as to make my set complete so far as they have been published by the City.

2743 Respondent moves to strike this evidence of the witness for all of the reasons heretofore urged and interposed.

[SEAL.] (Signed) N. T. GUERNSEY.

Subscribed and sworn to before me and in my presence this 17th day of September, 1906.

[SEAL.] (Signed) J. P. BLAISE,
Notary Public, Polk County, Iowa.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

Mr. GUERNSEY: I will say in explanation of the offer we are about to make that we are not sure whether this was offered or not.

Complainant now offers the title of the petition for re-hearing filed in the Street Railroad cases which are reported in the 73rd Iowa, as follows: "In the Supreme Court of Iowa, October Term, 1887. The Des Moines Street Railroad Company, appellant, *vs.* The Des Moines Broad Gauge Street Railway Company (two cases), Appellee, and Saine Plaintiff, Appellant, *vs.* The City of Des Moines *et al.*, Appellee. Appeal from Polk Circuit Court. Kauffman & Guernsey and Parsons & Perry, for Appellant. Baylies & Baylies, Runnells & Walker, and J. H. Detrick, City Solicitor, for Appellees. Appellees' Petition for Rehearing."

2744 Complainant also offers the signature to this petition for rehearing, as follows:

"Baylies & Baylies, and J. H. Detrick, City Solicitor, for Appellees."

And also that part of the said petition for rehearing including the last 12 lines of page 4 thereof, all of page 5 thereof, and the first 10 lines and the first word in the 11th line on page 6 thereof, as follows:

"The city between 1866 and 1886 increased its population by a steady growth from six thousand to forty thousand people. If the lines had not been extended until the present time beyond what they were in 1874 it would have been a losing investment today. Would this have been an argument in favor of the reasonableness of a thirty years' exclusive franchise? Whose fault was it that the road did not pay earlier? A growing city with six thousand people to commence with, the capital of the state extending over an area the size of the city of Des Moines, was there in the nature of things

any reason why this service, if properly conducted and operated should not have paid at once? The question is not, as we understand it, whether Dr. Turner, upon the plan he adopted and with his means did as well as he could, and yet did not make it pay, but rather would it have paid if proper trackage had been laid and cars properly operated so as to induce patronage? But passing this consideration we assume that no ordinance of this kind is valid it is in accord with the public interests and sound public policy—in other words, an ordinance in violation of public policy is unreasonable, and we urge the following considerations that enter into this question, and should receive the careful considera-
2745 tion of the court in determining it:

"1. It gives to the plaintiff company the right to perpetuity to occupy all the streets and alleys with single or double tracks of street railway, and requires that they shall be operated by animal power only. There is no limit of time upon this right. Upon the record in this case it is made apparent that there are but few, if any, of the streets that will bear more than a double track of street railway, without injuring if not destroying its use for other legitimate street purposes. In its opinion the court has evidently overlooked this fact, and the case is treated as though the grantee's rights in the streets were limited to thirty years, but the grant is contained in the first section and is as sweeping as language can make it. The only limitation upon this grant is contained in section 10, in these words:

The right herein granted to said company to operate said railway shall be exclusive for thirty years from the time the first mile of said track is laid and cars running thereon.

"This, we submit, only relates to the exclusiveness of the right, and leaves the company with its property interests in all the tracks, single or double, that it may have laid during this long term of years. In view of the facts that it is the capital of a young and growing state—a city of large area, increasing seven hundred per cent. in less than two-thirds of the time of the exclusive privilege alone, and the further fact that within this time all the available streets may in some portion be occupied by all the railway tracks that such streets can practically bear, so as to make the subsequent rights, though not exclusive in form, practically exclusive in perpetuity, are no small circumstances to be taken into account in determin-
2746 ing whether this ordinance was reasonable, both as to the time of the exclusive privilege and the grant in perpetuity beyond that time, though not in terms exclusive. Again we urge in this connection, and the fact that the grant embraced all the streets and alleys of the city, and was to be exclusive for thirty years, makes the whole ordinance unreasonable."

Respondent objects to the offer for the reason that it is incompetent, irrelevant, immaterial, and for the further reason that said offer and said evidence is not rebuttal, and that any matters contained in said offer would not be binding upon the City of Des Moines in any respect, nor binding upon the City of Des Moines, this respondent in this case. No objection is made on account of lack of identification.

Mr. CLARK: Respondent asks that you furnish us for inspection the books from which you have offered Exhibits 231 to 238 so that we may have them for inspection and comparison, and for the further purpose that we want to use them in determining whether we want to offer anything from them in connection with the matter that you have offered from them.

Mr. GUERNSEY: The record shows they are here and of course there has been no inclination or disposition to prevent any inspection of them that counsel may wish to make.

Mr. CLARK: That is what I want them for.

Mr. GUERNSEY: I will not let these books go out of my possession. If you want to look at them, you are welcome to come to my office and examine them. Inasmuch as these volumes are rare, I have refused to lend them for a good while.

Testimony closed.

2747 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

DES MOINES CITY RAILWAY COMPANY, Complainant,
vs.
CITY OF DES MOINES, Respondent.

Certificate.

We, the undersigned examiners, hereby certify: That pursuant to the stipulation and agreement of the parties in the above entitled action, and at the time and places hereinbefore set out, we took in writing in shorthand all the oral testimony introduced and offered; also all offers of written, documentary or record testimony, marked as exhibits, herein, or read into the record, or incorporated therein by direction of respective counsel; also all objections and motions made by respective counsel to all oral, printed, written or documentary evidence offered, and that the said shorthand report is a correct, true and complete report of all said testimony so offered as aforesaid.

We further certify that the foregoing transcript, together with the documentary evidence therein referred to, is a correct, true and complete transcript of Complainant's testimony, taken in shorthand, and the same, consisting of 3 volumes is now returned to this Court.

Dated this 17th day of September, 1906.

(Signed) J. P. BLAISE.
(Signed) EMMA K. BLAISE.
Examiners.

(Endorsed:) Filed Sept. 17, 1906. E. R. Mason, Clerk.

(Here follow maps marked pp. 2748, 2749, 2750, 2751, 2752, and 2753.)

2754 United States Circuit Court, Southern District of Iowa.

I, Edward R. Mason, Clerk of said Court for said District, do hereby certify that the foregoing is a full, true and complete copy of the Complainant's Testimony, filed September 17, 1906, also full, true and complete copy of Complainant's Exhibits "A", "B", "C", "D" "E" and "F", in the case of the Des Moines City Railway Company, Complainant, *vs.* the City of Des Moines, Defendant, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in the City of Des Moines in said District, this 20th day of November, A. D., 1907.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

2754½ File No. 20,840. Supreme Court of the United States, October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Stipulation of counsel and addition to record. Filed November 25th, 1907. (20,840.)

2755 In the United States Supreme Court, October Term, A. D. 1907. In Equity.

DES MOINES CITY RAILWAY CO., Complainant and Appellee,
versus
CITY OF DES MOINES, Defendant and Appellant.

Appeal from United States Circuit Court, Southern District of Iowa.

Hon. Smith McPherson, District Judge.

N. T. Guernsey, W. L. Read and Geo. H. Carr. For Appellee.
Wm. H. Brenner, Howard J. Clark and Wm. H. Baily. For Appellant.

Appellant's Statement of Errors Relied on and Designation of Parts of Record to be Printed.

Counsel for Appellee acknowledge receipt of a copy of within statement this 20 day of Nov'r, 1907.

N. T. GUERNSEY,
GEO. H. CARR,
W. L. READ,
Solicitors for Appellee.

2756 To Hon. James H. McKenney, Clerk of United States Supreme Court:

The City of Des Moines, Appellant above named, hereby submits the following statements in accordance with Paragraph 9 of Rule 10 of the Rules of the Supreme Court.

Statement of Errors Relied on.

The appellant asserts and intends to rely on each and all the errors contained and set forth in the assignment of errors filed in this cause and numbered 1 to 50 both inclusive as follows:

1st. That the Circuit Court erred in finding the equities of this cause to be with the complainant.

2nd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the streets of the City of Des Moines," and the amendments thereto, constitute a valid and subsisting contract between complainant and respondent.

3rd. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the Streets of the City of Des Moines," and set out as Exhibit "A" in complainant's complaint, and the amendments thereto, constitute a valid and subsisting contract between the complainant and respondent.

4th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the "Construction and Operation of Certain Street Railroads in and "along the Streets of the City of Des Moines," and the amendments thereto, have been ratified and confirmed by the City of Des Moines.

2757 5th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Au- "thorizing the Construction and Operation of Certain Street Rail- "roads in and along the Streets of the City of Des Moines," set out as Exhibit "A" in complainant's complaint, together with the amendments thereto, has for years been construed by the respondent, the City of Des Moines, as granting a perpetual franchise to the complainant.

6th. That the Circuit Court erred in holding that the respondent municipality, City of Des Moines, Could, by acts or conduct on the part of its officers, in relation to or in connection with the ordinance of December 10, 1866, grant rights by such acts or conduct in addition to the rights expressly set forth in said ordinance of December 10, 1866.

7th. That the Circuit Court erred in holding that the complainant, the Des Moines City Railway Company, could obtain rights or grants not expressly granted in the ordinance of December 10, 1866, by the acts or conduct of the officers of the respondent municipality, the City of Des Moines, in connection with or in relation to said ordinance of December 10, 1866.

8th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Con- "struction and Operation of Certain Street Railroads in and along "the Streets of the City of Des Moines," together with the amend-

ments thereto, has for years been construed as one granting a perpetual franchise.

9th. That the Circuit Court erred in holding that the ordinance of December 10, 1866, has been construed or otherwise treated by the respondent municipality, the City of Des Moines, or its officers, as in force or of any validity after the 1st day of January, 1898.

2758 10th. That the Circuit Court erred in holding that the ordinance of December 10, 1865, entitled, "An Ordinance "Authorizing the Construction and Operation of Certain Street Rail-"roads in and along the Streets of the City of Des Moines," together with the amendments thereto, creates or constitutes a perpetual grant or contract between complainant and respondent.

11th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1865, entitled, "An ordinance Authorizing the Con-"struction and Operation of Certain Street Railroads in and along "the Streets of the City of Des Moines," together with the amendments thereto, still exist or are still in force.

12th. That the circuit Court erred in holding and decreeing that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Authoriz-"ing the Construction and Operation of Certain Street Railroads in "and along the Streets of the City of Des Moines," except as to the exclusive features recited in Section 10 of said ordinance, together with the amendments thereto, are perpetual in the complainant, its successors and assigns.

13th. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant, or any of them, under the ordinance of December 10, 1865, as subsequently amended or modified, exist or were in force or effect after January 1, 1898.

14th. That the Circuit Court erred in holding that the rights, or any of them, vested in the complainant as assignee of the grantee in said ordinance, as subsequently amended or modified, are perpetual or were in force or existence after January 1, 1898.

15th. That the Circuit Court erred in holding that the 2759 rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An Ordinance Au-"thorizing the Construction and Operation of Certain Street Rail-"roads in and along the Streets of the City of Des Moines," as subsequently amended or modified, are impaired by the resolution of November 21, 1905, which said resolution is complained of.

16th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violated or impaired any right or rights of complainant.

17th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Section 10 of Article I of the Constitution.

18th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Article 14 of the Amendments to the Constitution of the United States.

19th. That the Circuit Court erred in holding that the enforcement and execution of the resolution of November 21, 1905, (which resolution is complained of,) by the respondent in this case, deprives the complainant of its property without due process of law, in violation of Article 14 of the Amendments to the Constitution of the United States.

20th. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, was in violation of the *bo*ligation of any contract existing between the complainant and the respondent, and especially in holding that the same was in violation of the ordinance of December 10, 1866, as subsequently amended and modified.

2760 21st. That the Circuit Court erred in ordering, adjudging and decreeing that the resolution complained of, of November 21, 1905, as set out and contained in Paragraph 32 of complainant's bill, be cancelled, annulled, set aside, and held for naught.

22nd. That the Circuit Court erred in granting an injunction restraining the respondent and its officers from enforcing and executing, or attempting to enforce and execute the resolution of November 21, 1905, set out in Paragraph 32 of complainant's bill of complaint.

23rd. That the Circuit Court erred in granting an injunction restraining respondent and its officers from dist*ro*bing, impeding or interfering with the complainant in the enjoyment of the rights and privileges claimed by it under the ordinance of December 10, 1866, entitled, "An Ordinance Authorizing the Construction and Opera-" tion of Certain Street Railroads in and along the Streets of the City " of Des Moines," as subsequently amended and modified.

24th. That the Circuit Court erred in granting an injunction, and ordering, adjudging and decreeing that the respondent, the City of Des Moines, its City Council and Mayor and City Solicitor, and all officers of said city and those hereafter officers of said city, and each and all of them now holding office in said city, and all servants agents and employés, and all their successors in office, be enjoined from, in any manner, disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors or assigns, of any rights, privileges and franchises vested in complainant, and vested in any corporation or company or person from whom complainant, by purchase or otherwise, has acquired rights.

2761 25th. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of Section 10 thereof, shall be perpetual to the complainant, its successors and assigns.

26th. That the Circuit Court erred in granting an injunction, and adjudging and decreeing that the City of Des Moines and its officers, including the City Solicitor, be enjoined from bringing or maintaining an action or actions in court to ascertain and determine the respective rights of complainant and respondent.

27th. That the Circuit Court erred in ordering and decreeing that the respondent and its officers be enjoined from bringing or main-

taining an action or actions in court to oust complainant from the streets, alleys and public places of the respondent municipality.

28th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to test the rights of complainant to operate street railways in the respondent municipality, the City of Des Moines.

29th. That the Circuit Court erred in ordering, decreeing and enjoining the respondent and its officers from bringing or maintaining an action or actions in court to ascertain and determine the rights of complainant to hold or exercise the franchise claimed by it.

30th. That the Circuit Court erred in not defining what rights, privileges and franchises were vested in the complainant under the various ordinances and franchises upon which it based its right to recover in this suit.

2762 31st. That the Circuit Court erred in ordering and decreeing that the respondent and its officers and agents and their successors in office, be enjoined from interfering with the free use and comfortable enjoyment of the complainant, its successors and assigns, of the rights, privileges and franchises vested in complainant, including the ordinance of December 10, 1866, as subsequently amended and modified, without finding, adjudging and decreeing what rights the complainant had, and what rights existed under the ordinances and franchises as set out in the complainant's bill of complaint.

32nd. That the Circuit Court erred in not holding that the rights and privileges acquired and owned by the Des Moines City Railway under the ordinance of December 10, 1866, as subsequently amended and modified, expired on January 1, 1898.

33rd. That the Circuit Court erred in holding, adjudging and decreeing that the resolution of the City Council of the respondent city passed on November 21, 1905, and set out in Paragraph 32 of complainant's bill of complaint, was a law.

34th. That the Circuit Court erred in holding that the City of Des Moines had the power or authority vested in it to grant a perpetual right or franchise to construct, operate or maintain a street railway in and over the streets, alleys and public places in the City of Des Moines in perpetuity.

35th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, was vested with the power or authority to grant a right or franchise to construct, maintain and operate a street railway over or upon the streets, alleys and public places of the City of Des Moines.

36th. That the Circuit Court erred in holding that the respondent, the City of Des Moines, had the power or authority on December 10, 1866, to grant a perpetual right to construct, maintain or 2763 operate a street railway upon, over or along the streets, alleys and public places of the City of Des Moines.

37th. That the Circuit Court erred in holding that the City of Des Moines was, at any time after December 10, 1866, granted or given the power or authority to grant or pass a franchise or ordi-

nance or make a contract granting or vesting in any person, firm or corporation the right or privilege to construct, maintain or operate a street railway over, upon or along the streets, alleys and public places in the City of Des Moines, in perpetuity.

38th. That the Circuit Court erred in holding that the City of Des Moines at any time ever granted, ratified or confirmed any grant in perpetuity, to construct, maintain or operate a street railway over, along or upon the streets, alleys and public places of the City of Des Moines.

39th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right to construct, maintain or operate street railways upon, along or over the streets, alleys and public places of the City of Des Moines under the ordinance of December 10, 1866, as subsequently amended and modified.

40th. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right and privilege, granted to it by ordinance or otherwise, to construct, maintain or operate street railways upon, over or along the streets, alleys and public places in the City of Des Moines.

41st. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, as subsequently amended and modified, was a valid, subsisting contract between the complainant and the respondent, and that thereunder, the complainant had the right to construct, maintain and operate street railways over, along or upon the streets, alleys, and public places of the City of Des Moines, which said right exists in perpetuity.

2764 42nd. That the Circuit Court erred in refusing to determine the rights of complainant under each of the ordinances or franchises declared on in its bill of complaint.

43rd. That the Circuit Court erred in refusing to determine all of the questions at issue as tendered by the allegations of the bill of complaint and the allegations of the respondent's answer.

44th. That the Circuit Court erred in holding that "the Des "Moines City Railway Company has also succeeded to the rights and "benefits of divers other ordinances granted by the City of Des "Moines to divers other corporations, or persons, which said several "other ordinances are referred to in the bill of complaint of com- "plainant."

45th. That the Circuit Court erred in holding that "the Des "Moines City Railway Company has also succeeded to the rights and "benefits of divers other ordinances granted by the City of Des "Moines to divers other corporations, which said several other "ordinances are referred to in the bill of complaint of complainant "company," without also stating and finding what other corporations and what other ordinances are intended or referred to, and without fixing and determining the rights of the parties under each of said ordinances and franchises.

46th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding or interfering with the use and enjoyment by complainant of rights, privileges or franchises

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other than those acquired or held under the ordinance of December 10, 1866, together with the amendments thereto.

47th. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding and interfering with the use and enjoyment by complainant of rights, privileges or franchises under ordinances respecting which controversies existing or hereafter arising are said not to be adjudicated.

2765 48th. That the Circuit Court erred in holding that all of complainant's street railways were constructed or operated under authority of the ordinance of December 10, 1866.

49th. That the Circuit Court erred in holding that the resolution of November 21, 1905, is a law or legislative act.

50th. That the Circuit Court erred in holding that the resolution of November 21, 1905, was an attempt to repeal, amend or modify the ordinance of December 10, 1866, as subsequently amended or modified.

Designation of the Record to be Printed.

The appellant designates the following parts of the record which it deems necessary for the consideration of the errors relied on.

Print: Pleadings, files etc. as follows:

Bill of complaint and exhibit attached....	Filed Nov. 27, 1905.
Ans. of Defendant.....	" Jan. 1, 1906.
Replication	" Jan. 1, 1906.
Præcipe for Appearance.....	" Aug. 14, 1906.
Amendment to Answer.....	" Dec. 3, 1906.
Opinion	" Feb. 20, 1907.
Order directing decree for Complainant....	" Feb. 20, 1907.
Final Decree.....	" Mar. 30, 1907.
Petition for Appeal.....	" July 9, 1907.
Order allowing Appeal.....	" July 9, 1907.
Assignment of Errors.....	" July 10, 1907.
Citation on Appeal and Return.....	" Aug., 1907.

Omit: Pleadings and files not so designated.

2766 *The Evidence.*

Print: All the evidence in the record including testimony and exhibits except those parts hereinafter requested to be omitted.

Omit: All captions and certificates by examiners and all notices stipulations and commissions to take testimony and the interrogatories attached thereto. Also all certificates authenticating copies of records offered in evidence.

Omit: All maps and plats offered by either party.

Deposition of N. W. Harris, filed June 25, 1906.

Print: Questions and answers.

Omit: Caption and certificate by notary and stipulation and interrogatories, also omit all exhibits attached.

Deposition of R. N. Bayliss, filed June 14, 1906.

Print: Questions and answers.

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Omit: Caption and certificate by notary and stipulation and interrogatories.

Complainant's evidence filed Sept. 17, 1906.

Print: The whole except as otherwise noted.

Print: Exhibit 1. Omitting certificate of Secretary of State.

Omit: Exhibits 2 to 11. Articles of Incorporation.

Print: Exhibits 12 to 27 omitting certificates of City Clerk.

Print: Exhibits 28 to 29, omitting acknowledgments and certificates of Recorder.

Print: Exhibits 30 to 43 omitting certificate- of City Clerk.

Print: Exhibits 44 and 45.

Print: Exhibits 46 to 52, omitting certificates of City Clerk.

Omit: Exhibit 53.

Print: Exhibits 54 to 64, omitting certificates of City Clerk.

Print: Exhibits 65 to 66, omitting acknowledgments and certificates of Recorder.

2767 *Print:* 67, omitting affidavit and exhibits A, B, C, and certificate attached.

Print: Exhibit 68.

Print: Exhibits 69 to 88, omitting certificates of City Clerk.

Print: Exhibits 89 and 90, omitting acknowledgments and certificates of Recorder.

Print: Exhibits 91 to 94, omitting certificates of City Clerk.

Print: Exhibit 95, omitting acknowledgment and certificate of Recorder.

Print: Exhibits 96 to 99, omitting certificates of City Clerk.

Omit: Certificates of Judge and Clerk of District Court.

Print: Exhibits 100 to 103, omitting certificates of City Clerk.

Print: Exhibit 104.

Print: Exhibits 105 to 118, omitting certificates of City Clerk.

Print: Exhibit 119, omitting acknowledgment and certificate of Recorder.

Print: Exhibit- 120 to 122, omitting certificates of City Clerk.

Print: Exhibit- 123 to 125, omitting acknowledgment and certificate of Recorder.

Print: Exhibit- 126 to 133, omitting certificates of City Clerk.

Print: Exhibit 134, omitting acknowledgment and Recorder's certificate.

Print: Exhibits 135 to 137, omitting certificates of City Clerk.

Print: Exhibits 138 to 142, omitting acknowledgment and certificate of Recorder.

Print: Exhibit 143, omitting certificates of City Clerk.

Print: Exhibit 144, omitting acknowledgment and certificate of Recorder.

Print: Exhibits 145 to 175, omitting certificates of City Clerk.

Print: Exhibit 176, omitting Auditor's certificate.

Print: Exhibit 177 to 223, omitting certificate of City Clerk.

2768 *Print:* Parts of Exhibit 224 (Revised Ordinances of 1900) as follows:

Title Page.

Pages 3, 4, and 5.
Pages 8, 9, 10, and 11.
Pages 45,-46 ordinances describing boundaries.
Pages 49-50 Secs. 31, 34, 35, 36, 37.
Pages 427 to 480.
Omit: All parts of Exhibit 224 not above indicated.
Omit: Exhibit 225 (Trust Deed).
Print: Exhibits 226 to 228, omitting certificates of City Clerk.
Print: Exhibit- 229 to 230, omitting Clerk's certificate.
Omit: Certificates of Judge and Clerk of District Court.
Respondent's evidence filed September 17, 1906.
Print the whole except as otherwise noted.
Omit: Part quoted from pages 9, 10, 11 Revised Ordinances of 1900.
Omit: Sec. 17 and 18 Revised Ordinances of 1900 quoted.
Omit: Opinion in State *vs.* West, 96 Iowa, 521, quoted.
Omit: Opinion in McCain *vs.* City of Des Moines, 103 N. W. Rep., 979, quoted.
Omit: Secs. 31 to 37 Revised Ordinances of 1900, quoted.
Print: Testimony of W. H. Bremner and Exhibits B, C, D, as quoted.
Print: Complainant's exhibits 225 and 226 as quoted.
Omit: Exhibits A, B, C, and D attached and complainant's exhibits 225 and 226 attached.
Respondent's evidence filed November 16, 1906.
Print the whole except as otherwise noted.
Print: Testimony of J. W. Budd.
Omit: Exhibits J and K.
Print: Testimony of Robert Fullerton.
Omit: Plats attached.

CITY OF DES MOINES, *Appellant,*
By W. H. BREMNER,
Its Solicitor and Counsel.

[Endorsed:] 437, 20840. 437.

2769 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City R'y Co. Statement of errors relied on and designation by counsel for appellant of parts of record to be printed and omitted and proof of service of same. Filed Nov. 23d, 1907.

2770 In the Supreme Court of the United States, October Term, A. D. 1907.

CITY OF DES MOINES, Appellant.
vs.
DES MOINES CITY RAILWAY COMPANY, Appellee.

Appeal from the United States Circuit Court, Southern District of Iowa.

The appellee, The Des Moines City Railway Company, pursuant to the provisions of section 9, rule 10 of the rules of the above named court now designates in writing, the additional parts of the record which it thinks material, the parts of the record so designated herein being in addition to the portions of the record designated for printing by the appellant.

Pleadings, Files, Etc.

In addition to the portions of the rest of the record designated by the appellee, print the following:

1. Motion for leave to amend answer, including the affidavit of W. H. Bremner in support thereof, filed November 16, 1906.

2. Resistance to the said motion for leave to amend, filed by the appellee, November 21, 1906.

The Evidence.

Print all captions (except in each instance the title of cause, name of the court and appearances of counsel) and all examiner's certificates, referring to, included in or attached to the complainant's testimony or any part thereof.

2771 Print all maps and plats, constituting a part of the complainant's testimony, including the maps and plats, marked exhibits "A," "B," "C," "D," "E" and "F," and referred to in the evidence of F. C. Tate and George B. Hippee.

Deposition of N. W. Harris.

Print the following portion of exhibit "A" of said deposition: "This indenture, made and entered into this first day of October, in the year one thousand eight hundred and eighty-nine, by and between the Des Moines Street Railroad Company, a corporation duly organized and existing under the laws of the State of Iowa, party of the first part, and The American Trust and Savings Bank, of the City of Chicago, Cook County, and State of Illinois, Trustee, a corporation duly organized and existing under the laws of the State of Illinois, party of the second part, witnesseth: * * *

Now therefore, for and in consideration of the premises and of the sum of one dollar cash in hand, paid to the said first party by the said second party before the sealing and delivery hereof, the

receipt whereof is hereby acknowledged, and in order to secure the payment of said bonds and coupons according to their tenor, the said first party has granted, bargained, sold, and conveyed, and does by these presents grant, bargain, sell, convey, mortgage and warrant to the said second party, as Trustee, and its successors, all the following described real estate, in the County of Polk and State of Iowa, to-wit: * * *

* * * together with all of its real estate, railroad tracks, personal property, franchises, rights, privileges, and appurtenances belonging or in any way appertaining to the party of the first part, and also all real estate, railroad tracks and personal property, franchises, rights, privileges, and appurtenances it may hereafter acquire, whether legal or equitable, including all rights, powers, privileges and franchises granted to or conferred upon the said
2772 first party by the State of Iowa and the Cities of Des Moines, North Des Moines, Capitol Park, University Place, Sevastopol, and other towns adjacent to said City of Des Moines, or which may be hereafter so granted and conferred. * * *

Filed for record October 1st, A. D. 1889, Recorded in book 233, page 72."

Print the following portion of exhibit "B" to the deposition of N. W. Harris.

"Circular No. 503. First mortgage six per cent. refunding and improvement bonds of the Des Moines Street Railroad Company of Des Moines, Iowa, dated October 1, 1889. * * *

With the occupation of all the important streets and territory of the city for nearly ten years to come, the Des Moines Street Railroad Company is in an unusually strong position and with full possession of the ground has practically an exclusive as well as a perpetual franchise."

Print the following portion of exhibit "C" to the deposition of N. W. Harris:

"This indenture, made and entered into by and between Des Moines City Railway Company, a corporation duly organized and existing under the laws of the State of Iowa (hereinafter called "Railway Company"), party of the first part, and the Illinois Trust and Savings Bank, Trustee, a corporation duly organized and existing under the laws of the State of Illinois (hereinafter referred to as "Trustee"), party of the second part, witnesseth: * * *

Now, Therefore, the party of the first part hereto, in consideration of the sum of one dollar paid by the said Trustee, receipt whereof is hereby acknowledged, and in order to secure the due and punctual payment of said several bonds and of the interest thereon, has granted, bargained, sold, transferred, assigned and conveyed, and does by these presents, give, grant, bargain, sell, transfer, assign and convey unto the party of the second part hereto, Trustee
2773 as herein provided, and its successors in trust with full power of succession to and enjoyment of the franchises of the party of the first part, all the following described real estate situate in the County of Polk, and State of Iowa, to-wit: * * *

Also all and singular the lines of railway and street railway of

the party of the first part hereto, also all buildings, road beds, rights of way, cars, tracks, machinery, street railway plants, engines, boilers, dynamos, electrical machines, electric motors, and other electrical apparatus, rolling stock, poles, lines and rails, and rights, liberties, leases, privileges and franchises, and all property of every kind and wherever situated, now belonging to the party of the first part hereto, as well as all rights and property of all kinds whatsoever, hereafter acquired by the party of the first part hereto: * * *

Filed for record August 5, 1893. Recorded in book 286, page 318."

Print the following portion of exhibit "D" to the deposition of N. W. Harris:

"Circular No. 690. $20,000 consolidated first mortgage six per cent. gold bonds of the Des Moines City Railway Company, controlling the entire street railway system in the City of Des Moines, Iowa, * * *

The legality of these bonds, and all proceedings incident to their issue, including franchise rights, etc., have been passed on and approved by our counsel, a copy of whose opinion will be furnished with bonds, if desired."

Print the following portion of exhibit "E" to the deposition of N. W. Harris:—

"Circular No. 722. $24,000 consolidated first mortgage six per cent. gold bonds of the Des Moines City Railway Company. * * *

The franchise rights of the company are very favorable
2774 and are practically perpetual. * * *

The legality of these bonds, and all proceedings incident to their issue, including franchise rights, etc., have been passed on and approved by our counsel, a copy of whose opinion will be furnished with bonds if desired."

Print the following portion of exhibit "F" to the deposition of N. W. Harris:

"This indenture, made this first day of April, A. D. 1901, by and between Des Moines City Railway Company, a corporation created and existing under and by virtue of the laws of the State of Iowa, hereinafter sometimes called "Railway Company," party of the first part, and Illinois Trust and Savings Bank, a corporation under the laws of Illinois, and William H. Henkle, of Chicago, Illinois, hereinafter sometimes called "Trustees," parties of the second part, witnesseth: * * *

Now, Therefore, for and in consideration of the premises and the sum of one dollar cash in hand paid to the party of the first part hereto by the parties of the second part hereto before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, and in order to secure the payment of said three thousand bonds and the interest thereon according to the tenor of said bonds and the interest coupons thereto attached, the party of the first part hereto has granted, bargained, sold, transferred, aliened, remised, released, conveyed, assigned and set over and does by these presents grant, bargain, sell, transfer, alien, remise, release, convey,

assign and set over unto the parties of the second part hereto, their successors in trust and assigns forever, the following described premises and property, to-wit: * * *

2nd. All and singular the lines of railroad and street railway of the party of the first part hereto, and all of its buildings, road beds, rights of way, cars, tracks, machinery, engines, boilers, dynamos, electrical machines, motors and other electrical apparatus,
2775 rolling stock, poles, lines, rails and street railway plant and equipment of all kinds; also all of the rights, liberties, leases, privileges and franchises of the party of the first part hereto and all other property, real, personal and mixed, and wheresoever situate now belonging to the party of the first part hereto, as well as all the property of all kinds whatsoever, real, personal and mixed, which the party of the first part hereto may hereafter acquire, with the rents, issues and profits of all of the same. * * *

Filed for record May 20, 1901. Recorded in book 418, page 263."

Print the following portion of exhibit "G" to the deposition of N. W. Harris:—

"We own and offer $5,000 refunding mortgage five per cent. gold bonds issued by the Des Moines City Railway Company * * *

The franchise under which the company is operating is broad and liberal in its terms and perpetual. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office * * *

Circular No. 1124."

Print the following portion of exhibit "H" to the deposition of N. W. Harris:—

"We own and offer refunding mortgage five per cent. gold bonds issued by the Des Moines City Railway Company * * *

The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office * * *

Circular No. 1291."

Print the following portion of exhibit "I" to the deposition of N. W. Harris:—

2776 * * * The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen in our office. * * *

Circular No. 1291A."

Print the following portion of exhibit "J" to the deposition of N. W. Harris:—

"* * * The franchise of the company is perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular No. 1353."

Print the following portion of exhibit "K" to the deposition of N. W. Harris:—

"* * * The franchise of the company is considered perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular No. 1416."

Print the following portion of exhibit "L" to the deposition of N. W. Harris:—

"* * * The franchise of the company is considered perpetual and broad and liberal in its terms. * * *

The title, franchises and all proceedings incident to the bond issue have been passed upon by our attorney, a copy of whose opinion may be seen at our office. * * *

Circular 1444."

2777 Print the offer of exhibit "53" in evidence made by the complainant.

In connection with exhibit "67," print affidavit and exhibits "A," "B" and "C."

In connection with the printing of exhibits "89" to "90," print acknowledgments and certificates of recorder.

In connection with the printing of exhibit "95," print acknowledgment and certificate of recorder.

In connection with the printing of exhibits "141" and "142," print acknowledgments and certificates of recorder.

In connection with the printing of parts of exhibit "224," print the following:—Title page and certificate on page facing the index.

Print the copy of the petition in City of Des Moines, plaintiff *vs.* Des Moines City Railway Company, defendant, attached to the deposition of Wm. H. Bremner and marked "Complainant's exhibit '225.'"

The appellee asks that the portions of the record which it has herein designated as material be printed with, and in addition to the portions of the record designated by the appellant as the parts thereof to be printed.

Des Moines, Iowa, February 10th, 1908.

DES MOINES CITY RAILWAY COMPANY, *Appellee,*

By N. T. GUERNSEY,
W. L. READ,
GEO. H. CARR,
Its Solicitors.

Service of the foregoing notice is hereby accepted on this
2778 11 day of February, A. D. 1908, and receipt of copy thereof acknowledged.

W. H. BREMNER,
City Solicitor,
HOWARD J. CLARK,
WM. H. BAILY,
Solicitors for Appellant,
By WM. H. BAILY, *Of Counsel.*

2779 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Designation by counsel for appellee of additional parts of record to be printed & proof of service of copy of same. Filed Feb'y 13th, 1908.

2780 In the Supreme Court of the United States.

THE CITY OF DES MOINES, Appellant,

vs.

DES MOINES CITY RAILWAY COMPANY, Appellee.

Stipulation.

In the above entitled cause, it is stipulated as follows:—

First.—Exhibit "2," which is not printed in full in the record, is a certified copy of the original and amended and substituted articles of incorporation of the Des Moines and Sevastopol Street Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 15th day of November, 1883, and that the business which it was authorized to transact was the construction and operation of one or more street railway lines in the city of Des Moines, Polk county, Iowa, and in the vicinity thereof.

Second.—Exhibit "3," which is not printed in full in the record is a certified copy of the articles of incorporation of the Des Moines Broad Gauge Street Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 7th day of December, A. D. 1885, and that the business which it was organized to transact was the construction and operation of one or more lines of street railway in the city of Des Moines, Polk county, Iowa, and in the vicinity thereof.

Third.—Exhibit "4," which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Street Railroad Company, showing that said company was a corporation organized under the laws of the state of Iowa, June 30th 1886, and that the business which it was organized to transact was the acquisition by construction or purchase, or both, of railways
2781 in the streets of the city of Des Moines and town of North Des Moines and the adjoining towns and territory, and the operation of the same, including the power to purchase or lease the property, real or personal, franchises, privileges, rights and capital stock of the corporation known as the Des Moines Street Railway Company and to own, maintain and operate the same, along and upon the streets of Des Moines, North Des Moines and vicinity.

Fourth.—Exhibit "5," which is not printed in full in the record, includes certified copies of two amendments to the original articles of incorporation, and the amended and substituted articles of in-

corporation of the Des Moines Street Railroad Company. The first amendment to the articles of incorporation of the Des Moines Street Railroad Company, increased the capital stock of the corporation to one million dollars; the second amendment to the said articles further increased said stock to two million dollars, and enlarged the powers of its board of directors. The amended and substituted articles of incorporation of said company, show it to be a corporation known as the Des Moines Street Railroad Company, organized under the laws of the state of Iowa, September 27th, 1892, and that the business to be transacted by it, is the acquisition by construction or purchase, or both, of railways upon the street or highways of the city of Des Moines, and adjoining towns and territory, including the right to operate the same and the power to purchase or lease the property, real or personal, franchises, privileges, rights and capital stock of the corporation known as the Des Moines Street Railroad Company, and own, maintain, and operate the same.

Fifth.—Exhibit "6," which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Rapid Transit Company, showing that said company was a corporation organized under the laws of the state of Iowa on the 6th day of September, A. D. 1887, the business to be transacted
2782 by it being the construction and operation of rapid transit railways in and about the city of Des Moines, and buying and selling land.

Sixth.—Exhibit "7," which is not printed in full in the record, is a certified copy of the articles of incorporation and an amendment thereto of the Des Moines Belt Line Railway Company, showing that it was a corporation organized under the laws of the state of Iowa on the 23d day of April A. D., 1888, the business to be transacted by said corporation being, to construct, own and operate one or more lines of railroad in, through, and around the city of Des Moines, Iowa, and its suburbs.

Seventh.—Exhibit "8," which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines Electric Railway Company, showing that said company was a corporation organized under the laws of the state of Iowa, July 31st, 1888, and that the business which said company was organized to transact was the acquisition by construction, purchase or lease of street railways, and their equipment and franchises in and along the streets and alleys of the city of Des Moines, the towns of North Des Moines, Capital Park, Grant Park, Chesterfield, Sevastopol, and all other towns and suburbs of the city of Des Moines in the county of Polk, together with all necessary or convenient charters or franchises from said city, towns or counties, and to construct, purchase and operate street railways.

Eighth.—Exhibit "9," which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines River Line Street Railway Company, showing that said company

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was organized under the laws of the state of Iowa, September 5th, 1888, the business to be transacted by said company being the construction, purchasing, leasing, owning and operating of one or more lines of street railroads in the streets and public places in the city of Des Moines, and in such other cities or incorporated towns, as may be determined by the board of directors.

2783 *Ninth.—Exhibit "10,"* which is not printed in full in the record, is a certified copy of the articles of incorporation and an amendment thereto of the Des Moines Suburban Railway Company, which show said company was incorporated Feb'y 1st 1889 under the laws of the state of Iowa and the amendment filed on October 9th, 1890, and that the business to be transacted by said company, was the construction, owning and operating of rapid transit railways from and through the city of Des Moines, Polk County, Iowa, to the various suburbs of the said city, and industries situated around said city.

The said amendment to the said articles also provided that said corporation should have the power to purchase and acquire railway lines, privileges and franchises, as well as the capital stock of other companies owning or operating railways or street railway lines, in or near the city of Des Moines, and to operate such railways either as stockholder or owner of its property and franchises with the power to sell its railways, stock, franchises or other property, or lease the same, to other persons or incorporations.

Tenth.—Exhibit "11," which is not printed in full in the record, is a certified copy of the articles of incorporation of the Des Moines City Railway Company, showing said company to be a corporation organized under the laws of the state of Iowa on July 24th, 1893. The business of said company is stated to be the acquisition by construction, lease or purchase of all railways or street railways upon the streets and highways of the city of Des Moines, and the towns adjoining said territory, including any cities, towns or townships in Polk County and the adjoining counties in the state of Iowa, which power shall include the right to acquire rights of way, depot, or other grounds necessary for the operation of its said railways and plant, by purchase, condemnation or otherwise, and also to acquire all necessary rights, privileges and franchises therefor. It is further given the power to own, maintain, sell or dispose of such sys-
2784 tem of railways or street railways, rights, privileges, franchises or property or any part thereof or to operate the same; to carry freight, passengers and mail over and along the same; and to transact and carry on any and all other business over and along the said railways and plant as is usually, or may hereafter be transacted or carried on *th* through roads and plants of like character.

Eleventh. That all exhibits purporting to be copies of ordinances resolutions or other matters shown by the records of the city of Des Moines, or of the various towns now incorporated in said city, were duly authenticated by the certificates of the proper officers, attached thereto, and that all other copies of public records read in evidence were duly authenticated in like manner.

Twelfth. That this stipulation shall be printed by the clerk as a part of the record in this cause.

Dated February 10th, 1908.

WM. H. BREMNER,
WM. H. BAILY,
HOWARD J. CLARK,
Solicitors for Appellant.
N. T. GUERNSEY,
W. L. READ,
GEORGE H. CARR,
Solicitors for Appellee.

2785 [Endorsed:] File No. 20,840. Supreme Court U. S. October Term, 1907. Term No. 437. City of Des Moines, Appellant, *vs.* Des Moines City Railway Co. Stipulation of counsel as to Exhibits in transcript of record. Filed Feb'y 13th, 1908.

Endorsed on cover: File No. 20,840. S. Iowa C. C. U. S. Term No. 437. City of Des Moines, appellant, *vs.* Des Moines City Railway Company. Filed August 30th, 1907. File No. 20,840.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 171.

CITY OF DES MOINES, APPELLANT,

vs.

DES MOINES CITY RAILWAY COMPANY, APPELLEE.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

Th ultimate question presented for decision is whether the appellee, the Des Moines City Railway Company, has the right to maintain and operate its street railways in the city of Des Moines.

The appellee is the successor of various companies, to which, as well as to the present company, the city of Des Moines has granted street railroad rights. The earliest grant was by the Turner ordinance dated December 10, 1866 (Exhibit "A" to bill, p. 18). The controversy in the court below centered about the construction of this grant. The immediate occasion for the filing of the bill was a resolution passed by the city council of the city of Des Moines November 21, 1905, requiring the appellee within twenty-five days to remove its tracks, poles and wires from the streets, bridges and public places of the city, and to restore the pavement

where the street had been paved. On the 27th of November, 1905, the complainant filed its bill for an injunction and, after a hearing upon the merits, an injunction was granted.

This resolution was the culmination of an attack upon this contract which originated in a *quo warranto* suit on the relation of several private individuals. Later the matter was taken up by the city.

When the resolution in question was passed, the appellee owned and operated about seventy-five miles of track in Des Moines. It is conceded that the service was modern and excellent. For a long series of years prior to about the time of the adoption of the resolution referred to, the appellee and its assignors had exercised their rights, with knowledge upon the part of the city that this ordinance was construed to be unlimited as to time, and with full acquiescence by the city in this construction.

The Issues.

The bill alleges the following matters that are admitted:

(*a*) That the complainant is an Iowa corporation organized July 24, 1893, with its principal place of business in Des Moines, for the purpose, among other things, of acquiring by construction, lease or purchase, railways or street railways in the City of Des Moines, with all the powers necessary to transact this business (Record, pp. 1 and 23).

(*b*) That the defendant city is a city of the first class, organized under the general laws of the State of Iowa as to municipal corporations, and having all of the powers of such corporations (Bill, par. 2, p. 2; Answer, par. 2, p. 23).

(*c*) The enactment and acceptance of the Turner ordinance dated December 10, 1866, and of the amendment thereof dated February 8, 1872, and of the further amendment thereof dated December 18, 1877, and of the further amendment thereof dated March 8, 1890 (Record, pp. 2, 3, 4 and 9, and pp. 23 and 24, paragraphs 3, 4, 5 and 10 of the answer).

(*d*) That the rights granted by the Turner ordinance as amended were, so far as they are legally assignable, assigned by the original grantee, the Des Moines Street Railway Company, to the Des Moines Street Railroad Company, and by the latter company to the appellee (par. 26 of the bill, p. 12; answer, par 15, p. 24).

(*e*) That as the outcome of the controversy between the said Des Moines Street Railroad Company and the city of Des Moines, a decree was entered in 1887 by the Supreme Court of the State of Iowa enjoining the city of Des Moines from interfering with extensions of its tracks which the street railroad company might then or thereafter need to make under the said ordinance of December 10, 1866 (Record, p. 5 and p. 24).

(*f*) The passage of the South Des Moines ordinance upon November 9, 1883, and its acceptance (Bill, par. 11, p. 6; answer, par. 9, p. 24).

(*g*) The passage of the Broad Gauge Street Railway ordinance and its acceptance (Bill, par. 19, p. 11; answer, par. 13, p. 24).

(*h*) The enactment of certain consolidation resolutions September 5, 1889, and that the consolidation was conditioned on their adoption, and that they were accepted (Bill, par. 13, p. 7; answer, par. 9, p. 24).

(*i*) That in reliance upon these resolutions, various street railroad properties in Des Moines were consolidated at large expense (Bill, par. 14, p. 9; answer, par. 9, p. 24).

(*j*) That these consolidation resolutions and the ordinance of March 8, 1890, passed in conformity with them, were ratified by an act of the legislature of the State of Iowa, effective April 30, 1890 (Bill, par. 15, p. 9; answer, par. 10, p. 24).

(*k*) That under the Broad Gauge Street Railway ordinances referred to in the bill, street railroads were constructed and operated.

(*l*) That the so-called Belt Line ordinance was passed May 16, 1888; that it was accepted, and that lines were built and

operated thereunder (Bill, par. 22, p. 12; answer, par. 13, p. 24).

(*m*) That the so-called River Line ordinance was enacted on September 20, 1888; that it was accepted, and that lines were built thereunder (Bill, par. 23, p. 12; answer, par. 13, p. 24).

(*n*) That the so-called Rapid Transit ordinances of May 14, 1888, and August 21, 1888, were enacted and accepted, and tracks constructed and operated under the earlier one (Bill, par. 24, p. 12; answer, par. 12, p. 24.)

(*o*) That all these ordinances and the rights granted under them were assigned to the appellee, and that the appellee has maintained and operated the entire system since about the 25th of August, 1893.

(*p*) That the work of building additional lines and of rebuilding existing lines done since January 1, 1898, has been with the knowledge of the city of Des Moines, and that the defendant company has, during that period, been assessed for paving and general taxes.

(*q*) That the appellee and its assignors have at all times claimed the rights now asserted by the appellee.

(*r*) That it is necessary that extensions of existing lines be built from time to time to furnish adequate service, and to successfully maintain and operate the present system.

(*s*) That the resolution of November 21, 1905, ousting the appellee, was passed upon that date and was served upon the appellee November 24, 1905. That the appellee is engaged in carrying the United States mails.

(*t*) That the lines of the appellee furnish the only means of intra-urban transit for the majority of the people in the city of Des Moines.

The denials of the answer are, in substance, limited to the following matters:

(*a*) A denial of knowledge as to what the Des Moines Street Railroad Company did prior to 1886 in reliance upon the Turner ordinance.

(*b*) A denial that the ordinances were legally assignable, and a denial that the assignments of them vested any rights in the appellee.

(*c*) A denial that the street railroad case in the Supreme Court of Iowa adjudicated the Turner ordinance to be a contract.

(*d*) A denial of the conclusion that the enactment of the various revisions of the city ordinances amounted in law to a re-enactment of the Turner and other street railroad ordinances.

(*e*) A denial that the city has in ordinances and resolutions recognized the present company as the holder of these various rights.

(*f*) A denial that the case of the *Des Moines City Railway Company vs. City of Des Moines*, 90 Iowa, 770, involved the question whether these rights had been assigned to and were held by the appellee.

(*g*) A denial that the Turner ordinance exists as a contract, and an averment that the rights granted by it were for but a limited time, with an averment that this time has expired.

(*h*) A denial that appellee's expenditures were in reliance upon this ordinance, or that the city has treated it as in force, or that the city has required or compelled extensions or changes, and a denial of the right to operate or extend and of intention to interfere with the appellee's legal rights.

(*i*) A denial of the bonded debt.

(*j*) A denial of any vested rights in appellee, and that this suit presents a Federal question.

It will be observed that these denials relate almost solely to legal conclusions. About the facts there is substantially no dispute.

THE FACTS.

The history of the street railways in Des Moines is briefly as follows:

1866, December 10th, the ordinance in question was enacted, granting to the Des Moines Street Railway Company, its successors and assigns, certain rights in the streets. A copy of this ordinance is Exhibit "A" to the bill (p. 18). This ordinance as amended is upheld by the decree of the court below. It is frequently referred to as the Turner ordinance. The Turner company built a line which was operated by animal power. It later acquired rights in the town of North Des Moines, then a suburb, but since 1890 a part of the city of Des Moines, and operated tracks in North Des Moines as a part of its system. In all, in 1886, when it was sold to the Des Moines Street Railroad Company, it had about ten miles of narrowgauge track. Speaking generally, the track was light, the equipment poor and the service worse.

1886, July 1, the Des Moines Street Railway Company (the original Turner company) sold its railway and rights to the Des Moines Street Railroad Company, a new corporation organized to take over the property.

In the meantime, interest had arisen in the street railway situation, and the city began to enact additional street railroad ordinances, and in the period from 1883 to 1889, it granted rights to the Des Moines Broad Gauge Street Railway Company, the Des Moines and Sevastopol Street Railway Company, the Des Moines Rapid Transit Company, the Des Moines Belt Line Company, the Des Moines Electric Railway Company, the Des Moines River Line Railway Company, and the Des Moines Suburban Railway Company. Several of these companies held grants from adjoining towns, in addition to those from the city itself. All of these adjoining towns became a part of the city in 1890.

1886, June 29th, the city enacted the Broad Gauge ordinance (Exhibit 26, p. 96). Under this ordinance, tracks were constructed and there immediately ensued controversies between the Broad Gauge Company and the Street Railroad Company, and between the last-named company and the city. The tracks constructed under the Turner ordinance, at this time owned by the Des Moines Street Railroad Company, were all narrow gauge.

The controversy between the companies was whether under section 10 of the Turner ordinance, the Street Railroad Company had an exclusive right entitling it to an injunction against the building of the tracks which the Broad Gauge Company was constructing. As between the old company and the city, the question was whether the Turner ordinance constituted a contract under which the old company was entitled to an injunction to prevent the city's interference with extensions of its tracks which the company was making and might need to make in the future.

1887, June 27th, these cases were decided by the Supreme Court of the State, that court holding that the old company was entitled to an injunction in each instance.

Street Railroad cases, 73 Iowa, 513.

Street Railroad cases, 74 Iowa, 585.

1887, December 20th, immediately after the decision on the rehearing in the cases referred to, the city granted to the Broad Gauge Company the right to construct, maintain and operate tracks, with electricity as the motive power (Exhibit 57, p. 138).

In

Teachout vs. Des Moines Broad Gauge Street Ry. Co., 75 Iowa, 722,

the Supreme Court of the State held that this electric grant did not violate the exclusive right granted by the Turner ordinance, which was held to include animal power only.

1889, September 5th, the consolidation resolutions were passed, and the broad gauge properties were acquired by the old company. The conditions leading to this consolidation were as follows:

There had been an uninterrupted controversy since 1886 between the Broad Gauge Company and the Des Moines Street Railroad Company, and between the latter and the city. The situation was intolerable. There were frequent clashes between the employés of the companies and the police officers of the city. There were in the city several street railroads, none of them operated with reference to either of the others. One was narrow gauge; the others were broad gauge. For a passenger to cross the city involved the payment of several fares, several transfers, with more or less walking from one road to another and waiting for connections. A suit had been brought by the city against the Des Moines Street Railroad Company praying the forfeiture of the Turner ordinance. Another suit was pending by the Des Moines Street Railroad Company against the Broad Gauge Company and the city for damages.

At this time Mr. J. S. Polk was not interested in the Des Moines Street Railroad Company or in the Broad Gauge Company, but was interested in some relatively insignificant street railroad properties in the city. He was requested by city officials and by various private citizens (p. 602) to attempt to end these controversies and place the properties in a position where they could be rehabilitated and the service could be improved, by bringing about a consolidation of the conflicting street railroad interests. He undertook and accomplished this. After securing options on various properties, as a condition to consummating the matter, he required:

First That there should be granted the right to use electricity as the motive power under the Turner ordinance.

Second. That the suit of the city to declare it forfeited should be compromised.

These objections were complied with by the passage of the resolutions of September 5, 1889. At the time that these negotiations were had, Mr. Polk knew that all parties, including the city, regarded the Turner ordinance as a grant of a permanent right, and that the city in the litigation between it and the Des Moines Street Railroad Company had formally placed this construction upon it. (Record, p. 603.)

1889, October 1st, the consolidation was completed by the conveyance of the property of the Broad Gauge and Sevastopol companies to the Des Moines Street Railroad Company. The work of rebuilding the various properties, broadening the gauge of the old narrow gauge track, removing tracks that were unnecessary because they were duplications, connecting the various lines so as to make one system out of them, and equipping the entire system for operation by electricity was undertaken and promptly completed.

The street railroad lines then existing, but not at that time conveyed to the Des Moines Street Railroad Company, were owned by companies which were operating in harmony with it or were soon acquired by it, so that all the street railroads within the city were operated as a single system. This situation continued, without change, until 1893.

1893, July 25th, the Des Moines Street Railroad Company and the other companies conveyed all of the street railroad properties in Des Moines to the appellee, the Des Moines City Railway Company. This brought under a single ownership the entire property which had theretofore been under one management. Until January 1, 1898, and thereafter, and until the fall of 1905, the situation continued without friction between the company and the city.

January 1, 1898, is the date upon which the city now contends that the rights under the Turner ordinance expired. After that date and prior to the fall of 1905, the city in numerous ways recognized this ordinance as still in force. On that date the company had 38.71 miles of track. Prior to the bringing of this suit 25.925 miles of this track had been rebuilt, and 37.78 miles of new track had been added. The company was regularly assessed for taxes. It was assessed for paving upon streets where track existed. It was required to pay the value of paving where it occupied streets already paved, and the money so paid by it was distributed to the abutting property owners. It was required to make various extensions. It rebuilt with large additions its power plant. It bought new equipment. All this was done without a suggestion that there was any question about its rights in the streets.

It is not contended that the company has not fulfilled all of its obligations to the public. It is not contended that it has failed to furnish adequate service at a reasonable price. The evidence that the facilities and service are much superior to those usually found in a city of the size of Des Moines is uncontradicted (Record, p. 573). In reliance upon the rights held by the company under the Turner ordinance, its bonds have been purchased by investors to the amount of about three million dollars, all of which has gone into the property. Since the organization of the first company, no dividends have been paid, but all surplus earnings have been used in developing and building up the property.

In the *Street Railroad Cases*, to which we have referred, the validity of the Turner ordinance as a contract between the city and the company has been determined by the Supreme Court of the State of Iowa. Therefore there remains but one ultimate question which may be a matter of argument, viz., the proper construction to be put upon this contract.

BRIEF.

I.

For forty years, commencing with the enactment of the Turner ordinance, the city consistently construed the contract to be without limit as to time.

The circumstances attending the enactment of the ordinance, as well as the subsequent transaction between the company and the city, and especially what transpired after it is now contended that the rights under the ordinance expired, are all material to its construction.

(*a*) *The circumstances surrounding the enactment of the ordinance.*

In Iowa a party to a contract is bound by the construction of it which he had reason to suppose the other party placed upon it.

Code, section 4617.

Evans vs. McConnell, 99 Iowa, 326.

The changes made in the Indianapolis ordinance used as a model and the other circumstances show that when the ordinance was enacted the city knew the purpose was to make a permanent grant.

(*b*) *The period from 1886 to 1889.*

Through grants of a competing company, a bitter controversy arose between the old company, the new company, and the city, covering a period of three years. The evidence shows that during this entire period, when the ingenuity of counsel for the city was taxed to its utmost to devise means to overthrow this Turner grant, it was never

suggested that the grant was limited, but on the contrary its unlimited duration was recognized.

Des Moines City Railway Company vs. City of Des Moines, 73 *Iowa*, 513,

which grew out of this controversy, recognized the Turner ordinance as a valid contract. In this case the city was perpetually enjoined from interfering with the exercise of rights under it.

In this suit, the city, in a formal petition for rehearing, deliberately and affirmatively recognized this grant as permanent.

In 1889 this controversy was ended by a consolidation of the two companies. Throughout this consolidation and the subsequent financing and rehabilitation of the property, the permanency of this Turner grant was taken as the fundamental basis of the transaction.

(*c*) *From 1889 to 1898.*

It is upon the 1st of January, 1898, that it is now contended that this grant ended. From the reorganization in 1889 until this time, the grant was continually recognized as in force by the city. In the summer of 1893 the present company was organized and took over the property and new bonds were issued upon the faith of this construction.

(*d*) *Transactions after January 1, 1898.*

After the 1st of January, 1898, and until the passage of the resolution in controversy in this case, the city frequently and unequivocally recognized the Turner grant as in force. It did this by the enactment of numerous ordinances and resolutions, and otherwise.

January 1, 1898, the company had 38.71 miles of track. After that date, with the knowledge and concurrence of the city, it rebuilt 25.95 miles of this track and added 37.78 miles of new track without a suggestion that its rights had expired, and much of this work was done at

order or request of the city. The city required the company to pave, it assessed the company for taxation, and in every way recognized it as entitled to occupy the streets.

II.

That the ordinance in question constitutes a contract, has been authoritatively determined, so that there remains only the question of construction.

In the

Street Railroad Cases, 73 Iowa, 513; 75 Iowa, 585,

the validity of this Turner ordinance as a contract was adjudicated by the supreme court of the State.

In

Des Moines City Railway Company vs. City of Des Moines, 90 Iowa, 770,

the present company was recognized as the holder of this contract. The validity of the contract having been established by these cases, there remains simply the question of its construction.

III.

The grant in the Turner ordinance of December 10, 1866, is without limit as to time.

Upon the face of this ordinance, the grant is unlimited as to time. The first section grants a general right, and section 10, instead of being a limitation, grants, in addition, an independent exclusive right.

The contention that section 10 limits section 1 is unsound, because:

(*a*) The general scope of section 10 is to add to the grant and not to diminish it.

(*b*) The words "after the expiration of said term" recognize the existence of the general right after the exclusive right has expired.

(*c*) The words "impair or destroy" could have no force, if there were no right to impair or destroy, after the expiration of the thirty-year term.

(*d*) Section 10, if rewritten in the language of the supreme court of the State, relates solely to the additional independent exclusive grant.

(*e*) The obligation to make extensions referred to in the opinion in the street railroad cases is unlimited.

(*f*) The opinion clearly treats the ordinance as making two independent grants, one by section 1 and the other by section 10.

The words "and for the time," under the doctrine of

Railway Company vs. Nave, 38 Kansas, 744,

as approved and applied in

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234-248,

clearly must refer to the time limited for performing the conditions subsequent, as to the construction of track, etc.

IV.

A grant unlimited as to time is permanent.

The proposition is thoroughly well settled that a grant on right in a street, not limited as to time, is permanent.

Detroit vs. Detroit Citizens St. Ry. Co., 184 U. S., 369-394.
People vs. O'Brien, 111 N. Y., 1.
Louisville Trust Co. vs. Cincinnati, 76 Fed., 296.
Blair vs. Chicago, 201 U. S., 486.
Kansas City Water Works Cases, 65 Fed., 691.
State vs. Commissioners, 61 N. J. L., 470.
State vs. Traction Co., 62 N. J. L., 386.
State vs. Ladies of the Sacred Heart, 99 Mo., 533.
Suburban Electric L. & P. Co. vs. East Orange, 41 Atl., 865; 44 Atl., 628 (not officially reported).
State ex. rel. Mayor, etc., of Jersey City, 49 N. J. L., 303.

Railroad Company vs. New Orleans, 46 La. Ann., 526.
Africa vs. Mayor, etc., 70 Fed., 729.
Id. on Appeal, 77 Fed., 507.
Trustees of Southampton vs. Jessup, 162 N. Y., 122.
Seattle vs. Columbia, etc., Railroad Co., 6 Wash., 379.
Port of Mobile vs. Louisville & Nashville R. R. Co., 84 Ala., 115.
Milhau vs. Sharp, 27 N. Y., 611.

Nor can it be contended that the right was limited to the life of the grantee.

Detroit vs. Detroit Citizens St. Ry. Co., 184 U. S., 394.
People vs. O'Brien, 111 N. Y., 1.
Blair vs. Chicago, 201 U. S., 486.

And under the laws of Iowa the original company has not expired, and it, as well as the succeeding companies, has the right to renew indefinitely.

Revision of 1860, Secs. 1151, 1158.
Sioux City Terminal R. & W. Co. vs. Trust Co., 82 Fed., 124.
Thompson vs. Lambert, 44 Iowa, 239.

V.

The established canons of construction.

There are certain established canons of construction to which resort must always be had.

(*a*) *The rules of construction applicable to the statutes are likewise applicable to legislative enactments of cities.*

In re Yick Yo, 68 Cal., 294.
Zorger vs. City of Greensburgh, 60 Ind., 1, 5.
Martin vs. City of Oskaloosa, 126 Iowa, 680.
Denning vs. Yount, 9 Kans. App., 708.
Id., 62 Kans., 217.
Ashland Water Co. vs. Ashland County, 87 Wis., 209.
People vs. Mayor, etc., of Brooklyn, 14 App. Div., 556.
State vs. Kirkley, 29 Md. 85-103.
Doane vs. City of Omaha, 58 Neb., 815.
People vs. Harrison, 185 Ill., 307.

(*b*) *The history of the act may be resorted to in aid of its interpretation.*

Aldridge vs. Williams, 3 How., 23.
United States vs. Union Pacific R. Co., 91 U. S., 79.
S. W. Mo. Lighting Co. vs. Scheurich, 174 Mo., 235.

(*c*) *Contemporary construction is entitled to great weight.*

Hahn vs. United States, 107 U. S., 402-406.
In re Washington St. A. & P. R. Co., 115 N. Y., 442.

(*d*) *The practical construction given to an enactment by those whose duty it is to enforce it, is entitled to great weight and will not be disregarded and overthrown except for cogent reasons, and unless it is clear that such construction is erroneous.*

Sutherland Stat. Constr. (2d ed.), par. 474.
Westbrook vs. Miller, 56 Mich., 148.
Turnpike Co. vs. Commonwealth, 96 Ky., 225.
Bloxham, Comptroller, vs. Street R. R. Co., 36 Fla., 519.
United States vs. Union Pacific R. Co., 148 U. S., 562.
Bank vs. Parker, 192 U. S., 73.
People vs. Fidelity & Casualty Co., 153 Ill., 25.

(*e*) *Acts of the parties.*

It is settled that the familiar doctrine that the acts of the parties may be resorted to in aid of the construction of a contract, applies to contracts with municipal corporations.

Chicago vs. Sheldon, 9 Wall., 54.
Blair vs. Chicago, 201 U. S., 486.
Van Hostrup vs. Madison City, 1 Wall., 291.
St. Louis Gas Light Co., vs. St. Louis, 46 Mo., 121.
Mobile vs. L. & Nashville R., 84 Ala., 115.
State ex rel. vs. Mayor, 49 Mo., 401.
City Ry. Co. vs. Street Ry. Co., 38 Pac., 986.
Auditor vs. Cain, 22 Ky. L. Rep., 1888.
Sherwin vs. Bugbee, 16 Vt., 439.

(*f*) *Matters in pari materia.*

All enactments pertaining to the same subject matter must be read together, as if enacted at the same time as a part of a single law.

Pennsylvania Co. vs. Frana, 13 Ill. App., 91.
Chicago vs. Sheldon, 9 Wall., 50.
State vs. Shaw, 28 Iowa, 78.
State vs. Sherman, 46 Iowa, 415-422.
Chamberlain vs. Iowa Tel. Co., 119 Iowa, 619.
Alexander vs. Alexander, 5 Cranch, 1-7.
United States vs. Freeman, 3 How., 556-564.
Atkins vs. The Disintegrating Co., 18 Wall., 272-301.
Cope vs. Cope, 137 U. S., 682-688.
Stockdale vs. The Insurance Companies, 20 Wall., 323.
Sutherland on Stat. Constr. (ed., 1904), par. 448.
Perkins vs. Perkins, 62 Barb., 531-534.
In re Livingston, 121 N. Y., 94-104.
Commonwealth vs. Sylvester, 13 Allen, 247.
In re Hall, 38 Kans., 670.
Powell vs. Sherwood, 162 Mo., 605.
Railroad Co. vs. Zerneeke, 59 Neb., 689.
Commissioners vs. Life Ins. Co., 90 Fed., 222.
Cochen vs. Meth. Prot. Church, 32 App. Div., 239.
Duncan vs. Owens, 47 Ark., 388.
Merrill vs. Gorham, 6 Cal., 41.
Ferrari vs. Board of Health, 24 Fla., 390.
People ex rel. vs. Hazlewood, 116 Ill., 319.
Hunt vs. Railway Co., 121 Ill., 638-644.
State vs. Township, 6 Ind., 83-90.
State vs. Gerhardt, 145 Ind., 439.
Kollenberger vs. People, 9 Col., 233.
Cincinnati vs. Guckenberger, 60 Ohio St., 353.
Town vs. State, 59 Vt., 39.
Simpkins vs. Ward, 45 Mich., 559.
Trust Co. vs. Iron & Coal Co., 47 Fed., 136.
State vs. Newport St. Ry. Co., 16 R. I., 533.

VI.

The rule of strict construction.

This rule may only be invoked where a doubt fairly arises which cannot be resolved by the application of the rules of construction.

Blair vs. Chicago, 201 U. S., 400,

states at pages 465 and 466 considerations which require its application radically differing from the case at bar. This rule does not apply where the intent of the parties can be ascertained nor where it would lead to unjust or inconvenient results not contemplated or intended.

People ex rel. The Gas Company vs. Deehan, 153 N. Y., 528-532.

Trustees of Southampton vs. Jessup, 162 N. Y., 122-127.

And the office of this rule is not to compel an immediate surrender to an ambiguity wherever it is suggested.

Citizens Bank vs. Barker, 192 U. S., 73-85.

In the case at bar the city has for forty years concurred in the interpretation of this ordinance, which it now seeks to repudiate. This rule of strict construction cannot be invoked in order to create an ambiguity, by engrafting upon the grant a constructive limitation in direct opposition to the intention of the parties as demonstrated by such a course of conduct.

VII.

The city is estopped from assailing the Turner ordinance.

The evidence shows without controversy that from 1889 to 1905 both parties to this contract have acted upon the assumption that it was without limit as to time and that upon the faith of this, substantially the entire investment in the present plant has been made.

The powers of the city which are involved here are its

proprietary or business powers and in their exercise it is bound by the rules which apply to private individuals.

Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed., 271.

This case is approved by this court in

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 10.
Omaha Water Co. vs. City of Omaha, 147 Fed., 1.
Bailey vs. Mayor, etc., 3 Hill (N. Y.), 538.
State ex rel. vs. Barker, 116 Iowa, 96-103.
Zabriskie vs. R. R. Co., 23 How., 381-400-401.

It is no answer to say that the code of Iowa has, since 1897, required a vote of the people in order to grant a right as to poles and wires.

Code of 1897, Sec. 775-776.

No vote of the people is necessary in order to authorize the construction and maintenance of tracks. It is only necessary as to poles and wires. Moreover, under the authorities, the estoppel shown by this evidence is good not only against the city, but as against the state and abutting property owners. All interested persons who stood by and saw this expenditure on the faith of this right and without objection are estopped.

Attorney General ex rel. vs. R. R. Co., 24 N. J. Eq., 50.
State ex rel. West vs. Des Moines, 96 Iowa, 521.
State vs. Town of Westport, 116 Mo., 582.
State of Arkansas vs. Leatherman, 38 Ark., 188.
Cooley on Constitutional Limitations (4th Ed.) p. 312.
Attorney General vs. Superior & St. Croix R. Co., 93 Wis., 604.
C. R. I. & P. R. Co. vs. City of Joliet, 79 Ill., 25-37.
City of Atlanta vs. Gate City Gaslight Co., 71 Ga., 125.
Penna. R. Co. vs. Montgomery County Passenger Ry. Co., 167 Pa., 62.
State ex rel. vs. Janesville Water Co., 92 Wis., 496.
Spokane St. Ry. Co. vs. Spokane Falls, 6 Wash., 521-524.

This doctrine is unequivocally recognized in

Street Railway Cases, 73 Iowa, 522.

The case of

Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234,

relied upon by appellant, is not in point. It involved absolutely no question of estoppel.

VIII.

The power of the city to make an unlimited grant is beyond question.

As already stated, the supreme court of Iowa has determined the validity of this contract.

Street Railway Cases, 73 Iowa, 513.

It is held that section 464 of the Code of 1873 granted the power to enact this ordinance.

Section 767, Code of 1897, re-enacts section 464 with the addition of t' powers granted by the act of the twenty-third general assembly, which also affirmatively legalizes the Turner ordinance. This legalizing act would remove all question as to power.

Louisville Trust Co. vs. City of Cincinnati, 76 Fed., 296.

Baltimore Trust Company vs. Baltimore, 64 Fed., 153.

It has never been the policy of the state of Iowa to limit the term for which street railway grants may be made. There is no limit as to time in section 464 of the Code of 1873 or in this section as re-enacted as 767 of the Code of 1897 or in section 775 of the Code of 1897 as to poles and wires, although in this same code, water, gas and light plants are limited to twenty-five years, by the express provisions of section 720.

The state itself made an unlimited telephone grant.

Chamberlain vs. Iowa Telephone Co., 119 Iowa, 619.

The supreme court of the state has recognized the power granted by section 464 as authorizing a permanent grant.

O'Neil vs. Lamb, 53 Iowa, 725.
Pratt vs. Railroad Co., 72 Iowa, 249.
Fowler vs. Des Moines & Kansas City R. Co., 91 Iowa, 533-540.
City of Des Moines vs. Rock Island R. Co., 41 Iowa, 569.

In 1873, when section 464 was enacted first, the custom was to grant unlimited rights. The word "authorize" is broad.

Blair vs. Chicago, 201 U. S., 400-457.
Kansas City Water Works Cases, 65 Fed., 691.
State vs. Commissioners, 61 N. J. L., 470.
State vs. Traction Co., 62 N. J. L. 386.
Detroit Citizens Street Ry. Co. vs. City of Detroit, 64 Fed. 628-635-642.
People ex rel. Woodhaven Gas. Co. vs. Deehan, 153 N. Y., 528.
Seattle vs. Columbia, etc., R. Co., 6 Wash., 379.

There is no question here as to the power conferred by a mere general authority over the streets. Whether this confers power to grant a street railroad right is doubtful under the authorities. These cases may not properly be invoked here because a street railroad is not, in Iowa, an additional servitude. See

Snyder vs. Fort Madison St. Ry. Co., 105 Iowa, 284.

IX.

The argument of appellant that the city was without authority to make the grant in question.

The complete answer to the contention of appellant that such a grant as the one involved here may not be made with-

out the express delegation of power to the city, is that, as we have already seen, there was this delegation of power in this case.

The argument that this is against public policy, is an attempt, by constructive limitation, to restrict the power expressly granted by the legislature to the city.

No question of public policy can, in fact, arise. If the city is without power to make a grant it is *ultra vires* and fails without reference to public policy. If the city has the power, the legislative act delegating the power determines the policy of the state in this respect.

That such a legislative enactment determines the policy of the state is clearly recognized by the supreme court of Iowa.

Board of Park Commissioners vs. Diamond Ice Co., 130 Iowa, 603.
Kuhn vs. Kuhn, 125 Iowa, 445-453.

The argument of counsel is nothing more nor less than that the court should set aside the legislative declaration of the policy of the state. This is not sound.

Citizens Water Co. vs. Bridgeport Hydraulic Co., 55 Conn., 1-16.

The authorities cited by counsel are those of exclusive grants in which a different rule has always been recognized. This same argument was repudiated by the state of Iowa in the *Street Railroad Cases*. The only case cited by counsel at all analogous in its facts is

Lake Roland Elevated Ry. Co. vs. City of Baltimore, 77 Md., 352.

The circuit court of appeals refused to follow it upon the same facts.

Baltimore Trust & Guaranty Co. vs. The Mayor of the City of Baltimore, 64 Fed., 153.

The Maryland case is in the face of the overwhelming current of authority.

People ex rel. Gas Co. vs. Deehan, 153 N. Y. 528-533.
Seattle vs. Railroad Co., 6 Wash., 379.
Trustees of Southampton vs. Jessup, 162 N. Y., 122.
Phillipsburg Electric Co. vs. Phillipsburg, 66 N. J. L., 506.
Suburban Electric Co. vs. Inhabitants of East Orange, 41 Atl., 865, affirmed in 44 Atl., 628 (not officially reported).
County of Floyd vs. Rome Street R. Co., 77 Ga., 614.
Nash vs. Lowry, 37 Minn., 261.
Citizens Water Co. vs. Bridgeport Hydraulic Co., 55 Conn., 1.
Denver St. Ry. Co. vs. Denver City Ry. Co., 2 Colo., 673.
Capdevielle vs. New Orleans & S. F. R. Co., 110 La., 904.

X.

Aside from the Turner ordinance, the rights granted under the other ordinances are sufficient to sustain all of the contentions of the appellee, and the fact that the company exercised its rights under the Turner ordinance was not an abandonment of its rights under the other ordinances.

Town of Golconda vs. Field, 108 Ill., 419.
Chamberlain vs. Iowa Telephone Co., 119 Iowa, 619.
State ex rel. vs. Nebraska Telephone Co., 127 Iowa, 194.

Authority to occupy streets not named in the original ordinance could be granted without a vote of the people:

Thurston vs. Huston, 123 Iowa, 157.

and these ordinances included the enlarged city when its boundaries were extended.

Gas Light Co. vs. St. Louis, 46 Mo., 121.
Blair vs. Chicago, 201 U. S., 489.

The rights granted by these ordinances were assignable, and the city consented to their transfer.

New Orleans, etc., Ry. Co. vs. Delamore, 114 U. S., 501.
Detroit vs. Detroit Citizens St. Ry. Co., 184 U. S., 368-395.
Louisville Trust Co. vs. City of Cincinnati, 76 Fed., 296.
Mayor of Knoxville vs. Africa, 77 Fed., 501.
Detroit Citizens St. Ry. Co. vs. Detroit, 64 Fed., 628.
Light & Power Co. vs. Tacoma, 17 Wash., 661.
City Ry. Co. vs. Citizens St. Ry. Co., 166 U. S., 557.
Morgan vs. Louisiana, 93 U. S., 217.

XI.

This case presents a federal question and the jurisdiction is clear.

The recent case of

Northern Pacific R. Co. vs. Duluth, 208 U. S., 583,

is exactly in point and rules this case. See also

Mercantile Trust & Deposit Co. of Baltimore vs. City of Columbus, 203 U. S., 311-322.
Shoshone Mining Co. vs. Rutter, 177 U. S., 507.
Saginaw Gas Light Co. vs. Saginaw, 28 Fed., 529.
Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65.
Pacific Electric Ry. Co. vs. Los Angeles, 194 U. S., 117.
City Ry. Co. vs. Citizens Ry. Co., 166 U. S., 562.
Walla Walla City vs. Walla Walla Water Co., 172 U. S., 1.
Iron Mountain R. Co. vs. Memphis, 96 Fed., 113.
Riverside A. Ry. Co. vs. City of Riverside et al., 118 Fed. 736.

Under the repeated decisions of this court, this resolution is a law and its effect is to destroy the appellant's rights.

The argument that this enactment should be by ordinance and that it is merely administrative, is beside the point as is the argument that the city did not mean what it said.

Old Colony Trust Co. vs. City of Wichita, 123 Fed., 779.

The effect of this resolution, if it were permitted to stand, would be to render unlawful the exercise by the complainant of its rights under this contract.

XII.

There is jurisdiction in equity.

Resort to equity is proper, because of the cloud upon the complainant's title, to avoid a multiplicity of suits, to prevent interference with necessary extensions, and because damages at law would be clearly inadequate.

Blair vs. Chicago, 201 U. S., 400-449.
Detroit vs. Detroit Citizens R. Co., 184 U. S., 368.
Cleveland vs. Cleveland City R. Co., 194 U. S., 531.
Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65.
Iron Mountain R. Co. vs. City of Memphis, 96 Fed., 131.
Omaha Water Co. vs. City of Omaha, 147 Fed., 1.

ARGUMENT.

I.

For forty years commencing with the enactment of the Turner ordinance the city consistently construed the contract to be without limit as to time.

Because they have a material bearing upon the proper construction of this Turner ordinance we desire to call attention to some of the circumstances attending its enact

ment, to the facts disclosed in connection with the controversy between the two companies and the city which commenced in 1886 and resulted in the reorganization of 1889, and to the occurrences after January 1, 1898, the date when the city now claims that the grant under this ordinance terminated.

(a) *The Circumstances Surrounding the Enactment of the Ordinance.*

Section 4617 of the Code of Iowa is as follows:

> SEC. 4617. Understanding of parties to agreement. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

This has been the law of Iowa since 1850. See
Code of Iowa, 1850, section 2401.
Revision of 1860, section 3993.
Code of 1873, section 3652.

One of numerous cases illustrating the application of this section is
Evans vs. McConnell, 99 Iowa 326.

Mr. J. S. Polk prepared the original draft of the Turner ordinance. He was for many years a member of the bar of this court, and was one of the original stockholders in the Des Moines Street Railway Company. He, however, disposed of his interests shortly after its organization, and had no further interest in the company until he acquired it in 1889 in connection with the consolidation. From that time he retained an interest, until his death in 1907.

Mr. Polk was a witness in this case. On page 451 of the Transcript he says:

> The whole ordinance was gone over with in the presence of the council, sitting as a council, and in

> the presence of the committee, and it was understood by them, and insisted upon by myself as attorney for the stockholders, that the franchise would not be accepted, unless it was perpetual and exclusive. I insisted on an exclusive franchise for sixty years; that matter was discussed fully at quite a number of the meetings, and *it was finally agreed that we would take a perpetual franchise with an exclusive feature for thirty years, and that was embodied in the ordinance.*

He says in support of these contentions it was urged (Transcript, p. 451)

> that it was an experiment as to whether street cars would be remunerative in Des Moines. The city was then a small village, sparsely settled, and unless we could get a franchise that would be exclusive for a period of time that would enable us to get back our investment, we refused to have anything to do with it. The town was then, I would say, not over 5,000 people, and while we all were ambitious and had great hopes for the future, we did not know whether these hopes would be realized or not, and we did not want to, and in fact refused to put the money into it necessary to build the road, unless we had a guaranty that we would have control of the situation for the length of time that would enable us to get back our investment.

This testimony is not contradicted by any one.

A fact of great importance appears from the testimony of Mr. Polk at pages 452 and 453. As a basis for the Turner ordinance, there had been obtained a copy of a street railway ordinance enacted by the city of Indianapolis, January 18, 1864. This was taken as a model, changes being made in order to make it conform to the agreement between the company and the city of Des Moines. A copy of this Indianapolis ordinance was furnished to the city council while the negotiations were pending (Transcript, p. 454) so that

its attention was directly called to the changes made and their purpose. Mr. Polk says (Transcript, p. 454):

> I meant to say that the clause in the Indianapolis ordinance was changed so that it gave us a perpetual franchise, and an exclusive franchise for thirty years and this change was adopted and agreed upon by all of us and inserted in the Turner ordinance, which was finally passed.

He says further, on page 455:

> Int. 32. So that, if I understand you correctly, what you told the council you had done and intended to do, was to modify the Indianapolis ordinance, so as to make it perpetual and exclusive for thirty years, and they assented to that?
>
> Answer. That is what I told them, and very emphatically, and they assented to it finally.

The Indianapolis ordinance was offered in evidence in this case, and is Exhibit "12." Transcript, page 75. *A comparison of the portions of the two ordinances material to this question shows that the change made was to eliminate from the Indianapolis ordinance the part of it which limited its grant to thirty years.* We print in parallel columns section 15 of the Indianapolis ordinance (Trans., p. 80) and this section as it appears in the Turner ordinance (Trans., pp. 20 and 21):

Section 15, Indianapolis Ordinance.	*Section 10, Turner Ordinance.*
The right to operate said railway *shall extend to the full time of thirty years from the passage hereof*, and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to	The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after

or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to the said company.	the expiration of said term, grant to or confer upon any person or corporation, any privileges which will impair or destroy the rights and privileges herein granted to said company.

It will be noted that the words in the Indianapolis ordinance, "extend to the full time of thirty years from the passage hereof," which are the words limiting the grant in that ordinance to thirty years, are omitted, and in lieu thereof, there are inserted in the ordinance now under consideration, the words: "shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon."

The city of Indianapolis agrees not to grant privileges which will impair or destroy the rights and privileges granted in its ordinance *"during all the time to which the privileges hereby granted to said company shall extend;"* while in the Turner ordinance, this is modified so as to provide that the city of Des Moines shall not, *until after the expiration of the exclusive term*, grant any such rights or privileges to others.

The Indianapolis ordinance granted an exclusive right limited to the term of thirty years. If it had been the purpose to grant such a right by the Turner ordinance of December 10, 1866, no change in this part of the Indianapolis ordinance would have been made, because it could not have been made without defeating that purpose.

The Indianapolis section contained apt language for a thirty-year exclusive grant. The fact that these changes were made demonstrates that the purpose of the parties was to make the grant different from that in the Indianapolis ordinance, and that *the change intended was to strike out the limit upon the term of the grant.*

The testimony of Dr. Turner, who first owned the property (Transcript, p. 456) shows how well founded the fear

was that for many years the property would prove wholly unremunerative.

Mr. Polk's recollection as to the original transaction is entirely corroborated by an addition which he made to the opinion given by Mr. Galusha Parsons as to the duration of the rights under this ordinance. This opinion was given prior to July 1, 1886, to the gentlemen who were then negotiating with Dr. Turner for the purchase of the property (Transcript, p. 458) and was submitted to Mr. Polk for his judgment. At this time, Mr. Polk had no interest in the property. He appended to the opinion of Mr. Parsons the following written statement:

> I drew the ordinance in question and know that the intention was to give the street railway company a perpetual right in the streets which should be exclusive for thirty years. I therefore concur in the conclusion reached by Mr. Parsons above.
>
> (Signed) J. S. POLK.

This entirely accords with the present testimony of Mr. Polk as to the circumstances which surrounded the enactment and acceptance of this grant.

(*b*) *The Period from* 1886 *to* 1889.

For about twenty years the Des Moines Street Railway Company, controlled by Dr. Turner, operated the property. July 1, 1886, the property was acquired by the Des Moines Street Railroad Company (Transcript, pp. 102, 103, and 104). June 29, 1886, the city granted to a competing company, the Des Moines Broad Gauge Street Railroad Company (succeeded by the Des Moines Electric Railway Company) the right to construct and operate a street railroad in certain specified streets. The first broad gauge ordinance is Exhibit "106" (Transcript, p. 96).

Work was commenced under this ordinance at once. Immediately there arose a bitter controversy between the old

company, its tracks being narrow gauge, and the new or Broad Gauge Company, and the city. This controversy was attended by many enactments of the city council, and ended only with the consolidation in September, 1889. Throughout this controversy the duration of the non-exclusive grant in the Turner ordinance was treated as unlimited, notwithstanding the intense and bitter feeling which the controversy at once engendered and which was maintained during this period. Note the testimony of Mr. McCain, the president of the Des Moines Street Railroad Company, that he was arrested seven times in one day (p. 587).

It will also be remembered that during this period the litigation was pending between the city and the Des Moines Street Railroad Company (Record, p. 119), in which the decree set out on page 5 of the record was rendered by the Supreme Court of the State; and also that during this period the city brought its action to cancel the ordinance in question (Record, p. 164); and that also at this time the Street Railroad Company had an action pending for damages.

In the case of the

> *Des Moines Street Railroad Company vs. City of Des Moines*, 73 Iowa, 513,

it was held that the Turner ordinance constituted a valid contract, and the decree to which we have referred was entered enforcing it against the city by permanently enjoining the city from interfering with the company in making extensions; and in the case of

> *Des Moines Street Railroad Co. vs. Des Moines Broad Gauge Street Railroad Company*,

submitted with the case just referred to and decided by the same opinion, the exclusive feature of the ordinance was sustained and an injunction was granted against the Broad Gauge Company. After the elaborate and thorough investigation of the questions which the trial of these cases had involved the city, through its counsel in this suit against it,

in a formal proceeding in court, in print, deliberately and not inadvertently or carelessly, stated its construction of this ordinance in a petition for rehearing in the following language, which is quoted from page 677 of the record:

> But passing this consideration, we assume that no ordinance of this kind is valid unless it is in accord with the public interests and sound public policy—in other words, an ordinance in violation of public policy is unreasonable, and we urge the following considerations that enter into this question, and should receive the careful consideration of the court in determining it:
>
> 1. *It gives to the plaintiff company the right to perpetually occupy all the streets and alleys with single or double tracks of street railway, and requires that they shall be operated by animal power only. There is no limit of time upon this right.* Upon the record in this case it is made apparent that there are but few, if any, of the streets that will bear more than a double track of street railway without injuring if not destroying its use for other legitimate street purposes. In its opinion, the court has evidently overlooked this fact and the case is, the court is treated as though the grantee's right in the streets were limited to thirty years, but the grant is contained in the first section, and is as sweeping as language can make it. *The only limitation upon this grant is contained in section* 10, *in these words:*
>
> *"The right herein granted to said company to operate said railway shall be exclusive for thirty years from the time the first mile of said track is laid and cars running thereon."*
>
> *This, we submit, only relates to the exclusiveness of the right, and leaves the company with its property interests in all the tracks, single or double, that it may have laid during this long term of years.* In view of the facts that it is the capital of a young and growing State—a city of large area, increasing seven hundred per cent in less than two-thirds of the time of the exclusive privilege alone, and the further fact that

> within this time all the available streets may in some portion be occupied by all the railway tracks that such streets can practically bear, so as to make the subsequent rights, though not exclusive in form, practically exclusive in perpetuity, are no small circumstances to be taken into account in determining whether this ordinance was reasonable, both as to the time of the exclusive privilege, and the grant in perpetuity beyond that time, though not in terms exclusive. Again, we urge in this connection, and the fact that the grant embraced all the streets and alleys of the city, and was to be exclusive for thirty years, makes the whole ordinance unreasonable.

Our statement that the expressions of this petition for rehearing were the deliberate expressions of the established attitude of the city with reference to this matter is confirmed by the deposition of Mr. Baylies, who was the counsel for the Broad Gauge Company at this time and who joined with the city in this petition for rehearing. We make excerpts from his testimony with reference to the Turner ordinance at pages 58 and 59. On page 58 he says:

> My construction of that ordinance at that time was: That it granted the rights given without limitation as to time, and made these rights exclusive for thirty years, and we urged before the courts that a grant of rights so broad, was unreasonable, and beyond the powers of the city council. The counsel representing the company holding under said ordinance also construed as granting a perpetual right, but differed from us as to the reasonableness of the grant. I believe that counsel representing the city were in accord with my views; as the utmost harmony existed between us, throughout the litigation, and I cannot recall any objection made to the construction stated.

On the next page he says further:

> I have no recollection now, of any one at any time preceding the consolidation of the companies in 1889, claiming or contending that the limitation of the ex-

> clusive right limited the general right of the company to occupy the streets, or that the general right was not perpetual. On the contrary, so far as I can now remember, the general opinion was that the ordinance granted the company the perpetual use of the streets, and made that right exclusive for thirty years.

The appellee was not organized until 1893. When it acquired this property in July, 1893, it acquired it upon the faith of this construction formally announced by the city seven years before, and consistently adhered to by the city for twelve years more, until the resolution of November 21, 1905.

Shortly after the enactment of the Broad Gauge ordinances and while the controversy between the old company and the city and the Broad Gauge Company was pending, the city attempted to modify the Turner ordinance and to that end passed the ordinance, Exhibit No. 39, which is set out on page 112. This ordinance in its title states that it is an amendment of the Turner ordinance. The significant part of this ordinance is to be found in section 11 (Record, p. 115), which we quote:

> SEC. 11. The right herein granted to said company to operate said railroad shall continue for the term of thirty years from the time the first mile of said track was laid and cars running thereon and no longer; provided, that nothing herein contained shall be construed to extend the rights of said company beyond the period of thirty years from the time the first mile of track was laid, nor to vest said company with any rights not now possessed under their original charter.

This is substituted for section 10 of the original ordinance. It changes that section by eliminating the exclusive feature, and by a limit of the grant of thirty years, demonstrating that the claim that the original section 10 imposed

this limitation is an afterthought, squarely opposed to the then construction of the contract by both parties to it. It also demonstrates that when the intent is to limit a grant to thirty years it is easy to express it.

This amendment was not accepted, and the city by abandoning it conceded its inability to force it upon the company.

October 12, 1886, the Des Moines Street Railroad Company filed its bill in the State court (Transcript, top of p. 469, and Exhibit "44," p. 119), setting up the Turner ordinance, the construction and operation of the road under it, the various re-enactments of it, the acquisition of the property by the Des Moines Street Railroad Company, and

> that with the increasing growth of the city comes the necessity for additional extensions of its lines of railway, not only for the purpose of accommodating the public with street railway facilities, but for the purpose of preserving the value of the plaintiff's property, and that without such right of extension the plaintiff's property would become valueless.

It also set up that an extension upon Sycamore street had been commenced, and that the mayor and city marshal were preventing the completion of this work. The prayer was that the city and its officials be enjoined from interfering with the extension referred to.

> and that the said defendants and each of them be restrained and enjoined from interfering in any way or manner *with any other of the extensions that may hereafter be projected by plaintiff.*

It is admitted (Transcript, p. 470) that the decree set out in paragraph 10 is the decree which the Supreme Court of the State entered in this case. After finding that the exclusive right of the plaintiff is for thirty years and that

it has a right to make extensions, the decree proceeds with the following language (Record, p. 51)

> It is, therefore, ordered, adjudged and decreed, that the defendants, the city of Des Moines, J. H. Phillips, mayor of said city, and V. H. Botkin, city marshal, and their successors in office, be and are hereby restrained from interfering in any way with the construction, extension or operation by animal power of the plaintiff's lines of street railway upon any of the streets of the city of Des Moines.

This injunction is absolutely unlimited as to time, though the limit upon the exclusive right is referred to. This decree was entered in the case in which the petition for a rehearing, which has already been referred to, was filed.

We submit that the decree limited that the right, as well as the parties, restricted that right to an exclusive feature to be [illegible]. The decree was entered [illegible] Supreme Court of the State [illegible] and was [illegible] and overruled. It [illegible] the opinion that the exclusive [illegible] of the [illegible] and [illegible] the exclusive right [illegible] the [illegible] to be [illegible] The [illegible] and [illegible] [illegible] [illegible]

tric road did not infringe the exclusive right. Shortly thereafter and on May 24, 1888, the city council adopted a long indictment of the narrow gauge company, concluding with resolutions attempting to forfeit its rights under the Turner ordinance, and instructing the city solicitor to enforce the forfeiture (see Exhibit "60," p. 147). We quote part of it from the bottom of page 149:

> That the Des Moines Street Railway Company and its successors, the Des Moines Street Railroad Company, has by its repeated violations of the expressed and implied obligation of *its contract with the city of Des Moines, of December 19, 1866*, and subsequent amendments thereto in the particulars above stated and its repeated violations of the reasonable police regulations imposed upon it by the ordinances of the city of Des Moines heretofore named in the particulars above specified, forfeited its rights and privileges *under said contract* and released the city of Des Moines from its obligations under said contract.
>
> Resolved further that the *rights and privileges and exclusive right* of the Des Moines Street Railroad Company under its contract with the city of Des Moines to construct and operate street railroads by animal power upon all streets and upon all parts of streets in said city be and the same are hereby declared forfeited by the wrongful acts and misconduct of said company as hereinbefore stated, as well as for other acts and omissions not herein enumerated, and the city shall and does hereby renounce and rescind said contract and resumes all its original rights in and on each and all said streets and parts of streets used or occupied by said railroad company to the same extent as though said contract with said company had never been made.

Note that this resolution refers to a double grant, the rights and privileges *and exclusive right* of the Des Moines Street Railroad Company under its contract with the city. It is inconsistent with the present contention of the city

that the Turner ordinance granted only an exclusive right and included no other rights and privileges.

Following this up, on May 29, 1888, the council again arraigned the company and attempted again to declare a formal forfeiture. This resolution, omitting the details as to the alleged shortcomings of the company, is as follows (Transcript, p. 151):

> 1st. The council finds that the original ordinance granting the Des Moines Street Railway Company the right to construct and operate its lines of railway upon the streets of Des Moines was passed December 10, 1866, and an amendment thereto February 5, 1872.
>
> That by an ordinance passed September 14, 1886, the first named ordinance and its amendments were repealed and said company granted certain rights and privileges not necessary to enumerate here.
>
> 2d. The council further finds that said railway company and its successor have not only openly and publicly repudiated the ordinance of 1886, but have failed to conform thereto in many substantial and reasonable particulars and have continuously claimed and now claims that said ordinance was void and of no effect and that the said ordinance of 1866 with its amendments was and is in full force and obligation.
>
> 3d. The city council without admitting the invalidity of the ordinance of 1886 or recognizing the pretended rights of said company under said original ordinance has examined the construction of the line of railway and the long continued conduct of the company and its successor and compared the same with the requirements of said last mentioned ordinance and amendments, and thereupon finds that the said company and its successors have failed, neglected and refused to perform the conditions thereof or to comply with reasonable requirements therein prescribed in many respects, among which are "A." They have not constructed their railways upon the bridges used by them as required by section nine (9) of said ordinance. * * *
>
> 4th. The council further finds that by reason of the aforesaid violations of the said ordinance and

their duties imposed thereby on the part of the Des Moines Street Railway Company and its successor, the said Des Moines Street Railroad Company, the said last named company has forfeited al rights, privileges and franchises granted by said ordinance and amendments, and that the city has the right to annul the contract arising therefrom and repeal the same, and that the public good requires that said contract be forfeited and annulled, and the ordinance and amendments repealed if the same be now in force and effect.

5th. The council further finds that it would be inequitable and unjust, notwithstanding such repeated violations to deprive the said railroad company of the use of the streets so far as they are reasonably necessary to enable said company to operate the system now being operated by it, and to utilize all the property connected therewith. That therefore an ordinance should be passed granting such franchise to said company, its successors and assigns, and that the resolutions hereto appended should not be operative until the passage and approval of an ordinance having such object in view—

Therefore, Be it resolved by the City Council of the City of Des Moines—

That all the rights and privileges of the Des Moines Street Railway Company or of its successor, the Des Moines Street Railroad Company, granted or confirmed by the said ordinances of December 10, 1866, and its amendments or by the ordinance of September 14, 1886, are hereby forfeited and declared to cease and determine, and that the contract created by said ordinances and each of them be and the same is forever annulled and cancelled—*This resolution shall take effect upon the passage of an ordinance having for its object and purpose the granting of the right to the Des Moines Street Railway Company, its successors and assigns to use such streets as are reasonably necessary for the operation of its present system of service under such reasonable regulations as may be prescribed*—.

Be it further resolved that in the event of a failure of said Railway Company to accept the ordinance last mentioned if it shall be passed and approved within

> the time therein specified, the city solicitor is hereby authorized to institute such proceedings as he may determine to be necessary to give effect to and enforce the forfeiture herein declared, and he is further empowered to employ such additional counsel as he shall deem expedient. Be it further resolved that the mayor be instructed to cause a certified copy of these resolutions to be served upon the said Des Moines Street Railroad Company within three days after their adoption and approval.

It appears that a true copy of these resolutions (Transcript, p. 153) was served on the company on the 1st of June, 1888.

Note the provision which we have italicized—that the resolution is to take effect upon the passage of an ordinance granting to the company the rights necessary for the operation of its then system. What the city considered such an ordinance was passed. It is Exhibit "62," Record, page 154. The significant thing about this ordinance is that while it omits the exclusive feature of the ordinance of 1866, *the general right granted is unlimited as to time.* It limits the company to the streets then occupied and to such as the council might thereafter authorize. It strikes out the exclusive right contained in the Turner ordinance, but it does not attempt to impose any time limit upon the grant. It is utterly impossible that this city council, under the circumstances which this record shows then existed, after two years of bitter controversy, would have voluntarily offered to the Des Moines Street Railroad Company what, if the city's present position were sound, would have amounted to an indefinite extension of the duration of its rights in the streets. It will be noted later that this ordinance contained the words "and for the time" upon which counsel hang their entire contention. The force of what had been the accepted construction of this Turner ordinance for twenty-two years was then such as to compel this hostile council, in an atmosphere of extreme antagonism to the then holder of the grant, and

while it was granting only twenty-five year rights to the Broad Gauge Company to accept the construction of the grant as permanent and to offer a permanent non-exclusive right to the company. The record could not show a more positive and conclusive concession of the correctness of our contention that at this time the city and the company agreed in construing this grant as permanent.

The situation in Des Moines became intolerable. The city, the Broad Gauge Company and the Narrow Gauge Company were the principal factors in the street railroad war. The three or four relatively small companies were practically non-combatants. The controversy became so active that Mr. McCain, one of the officers of the Narrow Gauge Company, states that on one day he was arrested seven times (Transcript, p. 587). The service was intolerable. In some places there were three tracks in a single street; in one instance, perhaps four (Transcript, p. 588). To make a trip of any considerable distance it was necessary to use two or more lines, walk from one line to another, wait for cars and pay several fares (pp. 597-600).

Under these circumstances, the city officials as well as private citizens requested Mr. J. S. Polk, then interested in two of the smaller companies, to, if possible, bring about a consolidation that would end this controversy and create a situation where the public might expect reasonably good service. At this time the Broad Gauge Company had an electric right in the streets, originally granted for the term of twenty-five years and not quite two years old. This ordinance is Exhibit "27," Record, page 138, and was passed December 20, 1887. The Turner ordinance was passed in 1866, and if it was a grant for but thirty years, its unexpired term was but little more than eight years. Mr. Polk says, at page 602:

> I finally promised the city council to make an effort to bring about a consolidation of the various companies, and to that end entered into negotiations with the Des Moines Street Railroad Company, the Des

Moines Electric Railway Company and the Des Moines and Sevastopol Railway Company, which resulted in an arrangement by which myself and associates were given the right to acquire an interest in the Des Moines Street Railroad Company, and by which it acquired options upon the property of the Electric Company and the Sevastopol Company.

In this connection, Mr. Polk testified further:

Q. At that time you were solicited by the citizens and the mayor and city council to undertake a consolidation of the several street railways of the city, as you have stated, what knowledge and information did you have with respect to the Turner franchise—its provisions, the character of the franchise with respect to its being perpetual, the opinions of attorneys with respect thereto, and the opinions of the representatives of the city, and the mayor and city council in that respect? State fully.

A. I was familiar with the Turner franchise and knew that it had an exclusive grant that would not expire until January 1, 1898, *and I know further that the general right granted by it was perpetual.* I was not only familiar with the ordinance itself, *and the circumstances that had attended its enactment*, I was *also familiar with the opinion of Galusha Parsons*, that had been introduced in evidence, and I *further knew that the construction that I had placed upon this ordinance with respect to the perpetual character of the franchise had been placed upon it by the city in the litigation with the Des Moines Street Railway Company, which had terminated before the transactions of which I am now referring. I also knew that this construction of the ordinance was entertained by Judge Bailies, who represented the Broad Gauge Railway Company, and by Hon. A. B. Cummins, now the governor of the State of Iowa, who was then the special counsel for the mayor of the city, in the matter.*

I also knew and it is a fact, that in all the controversies between the city and the Des Moines Street Railroad Company, and the Broad Gauge Company,

which had culminated in the litigation between the city and the Des Moines Street Railroad Company and between the Des Moines Street Railroad Company and the Broad Gauge Company, and in the controversies and discussions that grew out of the street car situation in Des Moines, *it had never been questioned, but that the Turner franchise was perpetual except as to its exclusive feature*, expiring January 1, 1898; *no claim was ever made to the contrary.* Judge Baylies, representing the Broad Gauge Company, and James H. Deitrick, the city solicitor, in a printed argument filed in the Supreme Court, between the city, the Des Moines Street Railroad Company and the Broad Gauge Company, made statements to that effect, which are introduced in evidence.

As I stated, I was familiar with the accepted view with respect to the Turner franchise being perpetual and acted upon the assumption that it was perpetual throughout the negotiations with the city, respecting the consolidation, and at all times afterward in the reconstruction and development of the system.

Q. What, if any, requirements did you impose upon the city on behalf of yourself and associates, as to the conditions upon which you would undertake the consolidation?

A. The Des Moines Electric Railway Company had a franchise granted by the city, authorizing the use of electricity, but the franchise was limited in time and would expire twenty-five years from December 20, 1887. *Throughout the negotiations [illegible] with the consolidation of the city, [illegible] respect to the consolidation, I had stated that I would not have anything to do with the matter unless all questions as to the legality and validity of the Turner franchise were eliminated and [illegible] settlement of the suit brought by the city to cancel and annul such franchise, to which I have already referred. And I also stated, that I would not undertake it under a franchise for the use of electricity, that was not also perpetual.*

The city, on its part, desired especially to limit the rights of the company so that parallel tracks should not be nearer

than two blocks, and in the negotiations the perpetual feature of this grant was urged as an inducement to Mr. Polk's acceptance of this suggestion (Transcript, p. 604).

The negotiations continued until a meeting of the city council held upon the evening of the day when the options held by Mr. Polk were to expire. Mr. Polk testifies (Transcript, p. 605):

> Mr. Cummins, as well as other representatives of the city, strongly urged the necessity of the restriction as to the right to use and occupy parallel streets, and the reasonableness of the demand for the concession was based upon the statement, that inasmuch as the Turner franchise conferred a perpetual right, the city, as a condition of consenting to the consolidation, was entitled to the restrictions provided for by the resolution.
>
> As above stated, the city had granted to the Des Moines Electric Railway Company, the right to use electricity as a motive power for a limited period. It was the purpose to electrify the entire system, and I had stated to the representatives of the city that I would not go into the matter unless the right was conferred. I was not satisfied or willing to do so under the limited right granted to the Electric Railway Company, and at the meeting stated to the representatives of the city *that I required not only that the suit brought to cancel the Turner franchise be settled so as to remove any question of the validity of that franchise, but also the right to use electricity as a motive power should be granted without limit as to time, so that such right should also be perpetual.* Accordingly my demand with respect to the right to use electricity as a motive power was embodied in a second resolution, which now appears as Sec. 1340 of the revised ordinances of 1900, also introduced in evidence.
>
> Q. What conclusion was finally reached?
>
> A. After a session of the council, continuing until nearly midnight, I yielded to the requirements on behalf of the city, and the city yielded to my requirements and the council passed the two resolutions to

which I have referred, and they were approved and signed by the mayor. As soon as this was done, I elected to purchase under the options which I held, and that night, and before leaving the council room, paid the first $10,000 of the purchase price.

The resolutions adopted at this meeting as the result of this negotiation, upon the faith of which the first payment was made under the options at this meeting and the system was thereafter consolidated under the Turner ordinance, are set out on pp. 195-197 of the record. They recite the pending negotiations for consolidation and provide:

1. That as an inducement to it, and in the event of the consolidation of the Narrow Gauge Company, the Electric Broad Gauge Company and the Sevastopol Company, so that they shall be operated under one management, the city will dismiss its suit to cancel the Turner ordinance.

2. That the company operating the consolidated property shall accept such modification of its existing franchises as will require it, within a reasonable time, to adjust its systems of tracks, so that parallel streets shall not be occupied nearer than two blocks apart, no existing tracks to be taken up without permission of the council and not more than two tracks to be laid upon any street.

3. That consent, permission and authority is granted to the consolidated company to operate its road by electricity or other practical motive power.

These resolutions were accepted in writing (Exhibit 128, p. 197) by the Des Moines Street Railroad Company, the holder of the Turner ordinance, as the consolidated company. October 1, 1899, the Des Moines Electric Railway Company (Transcript, pp. 198 and 200) and the Sevastopol Company (Record, p. 210) conveyed their property to the Des Moines Street Railroad Company effecting the consolidation. The work done in transforming the property into a system is indicated by the map Exhibit "C," which is explained by the testimony on page 535. The various prop-

erties were connected; tracks which were duplicates were taken up; extensions were made; the narrow gauge tracks were broadened; property was purchased and the erection of a new power plant was commenced in 1890 (Transcript, p. 537). Practically all of the old material was useless, and the road had to be rebuilt. New equipment also was purchased (Transcript, p. 538). March 8, 1890, the city passed an ordinance amending the Turner franchise in accordance with the consolidation resolutions. This ordinance made the following changes:

(*a*) The use of electricity was authorized.

(*b*) Tracks on parallel streets nearer together than two blocks were prohibited without the consent of the city council.

(*c*) The removal of tracks then existing was prohibited without the consent of the city council.

(*d*) The rate of fare authorized by the ordinance was reduced to five cents.

(*e*) Some changes were made in the rules as to the operation of the cars.

By an act of the legislature of Iowa (Transcript, p. 218) the Turner ordinance as thus amended to authorize the use of electricity was legalized.

This was all in pursuance of the negotiations between Mr. Polk and the city of Des Moines which resulted in his undertaking the consolidation of these properties. The testimony, which shows that this consolidation was undertaken and completed upon the faith of the construction of this Turner ordinance which had been accepted for twenty years, is absolutely uncontradicted. Upon the faith of this construction, the city induced this investment. The only possible explanation of Mr. Polk's insistence that the validity of the Turner ordinance should be recognized and that the right to use electricity under it should be granted is that the consolidated property was to be acquired, rehabilitated, and operated under this franchise; and it goes

without saying that no one would have undertaken this upon a right to expire within less than nine years.

To recapitulate some of the salient facts with reference to this consolidation:

(1) Mr. Polk knew the facts as to the enactment of the Turner ordinance, and knew the actual purpose to make the grant unlimited.

(2) Mr. Polk knew that by all concerned—the city, the Narrow Gauge Company and the Broad Gauge Company—the grant was in fact construed as unlimited.

(3) Mr. Polk knew that in the petition for rehearing filed by the city, it had formally construed this grant as unlimited.

(4) Mr. Polk knew that in the ordinance of June 1, 1888 (Exhibit 62, p. 153), where the city attempted to repeal the Turner ordinance and to enact an ordinance which would confirm the rights which it conceded to the company, the grant was unlimited.

(5) Mr. Polk knew that in the suit by the city brought in July, 1888, to enforce this attempted forfeiture (Exhibit No. 67, p. 164) there was not a suggestion that this grant was limited, and knew that in its petition in that case the city alleged with reference to the unlimited ordinance, Exhibit No. 62, "*that by the passage of said ordinance it secured to the said railway company every just right*, in view of its repeated violations of the former ordinance, *to which it was or is entitled*" (p. 166).

(6) Mr. Polk knew that the Turner ordinance did not grant an electric right, and that if it was for a thirty-year term, it had only about eight years to run.

(7) Mr. Polk knew that the broad gauge ordinance granted an electric right, and that twenty-three years of its twenty-five year term remained.

(8) Mr. Polk demanded, as a condition precedent to the investment incident to acquiring the broad gauge and Sevastopol properties and rehabilitating the consolidated property, that the city authorize the use of electricty under

the Turner ordinance, and that the suit assailing its validity its twenty-five-year term remained.

(9) The city passed its resolutions (Record, p. 195, *et seq.*) reciting the pendency of these negotiations and stating that "as an inducement to such consolidation," if the consolidation is effected, the city will dismiss this suit upon the further conditions that the Narrow Gauge Company's suit for damages be dismissed, and that the existing franchises be modified so as to prevent parallel tracks nearer together than two blocks except by permission of the city (Record, p. 195).

(10) The city further provided in these resolutions (Transcript, p. 197):

> Whereas, negotiations are now pending for a consolidation of the different street railway companies of the city, and it is believed that the general welfare of the city will be promoted by such consolidation, therefore as an inducement to said consolidation be it resolved, That in the event of a consolidation being effected between the Des Moines Street Railroad Company, Des Moines Electric Railway Company, and the Des Moines Suburban Street Railroad Company, so that said consolidated roads shall be operated under one management, that consent, permission and authority is hereby granted to said consolidated company to operate its railroad now or hereafter constructed by electricity or other practical motive power.

(11) These resolutions were formally accepted by the Des Moines Street Railroad Company (p. 197).

(12) They were effectuated by an ordinance which amended the Turner ordinance, demonstrating that this was the ordinance under which it was anticipated the consolidated properties would be operated (Exhibit 10$\frac{2}{2}$, p. 215), and this was confirmed by legislative enactment.

We submit that this record amounts to an absolute demonstration that the parties to this negotiation united in the belief that the Turner ordinance was not to expire in eight

years. It is utterly incredible that both of these parties should have been solicitous about the terms of the Turner ordinance and about the provisions of the amendment to it, and should have been indifferent as to the broad gauge electric ordinance if the latter had about three times as long to run as the former. It is impossible that Mr. Polk should have contemplated the consolidation of this property under a right having but eight years to run, and it is equally impossible that the city should have anticipated that either he or any one else would make such an investment upon that basis.

(*c*) *From 1889 to 1898.*

From 1889 down to the time that the resolution in controversy was passed, the city recognized the construction of this contract which had theretofore been adopted.

It is contended by counsel that after 1897 a new contract could not be made by implication, because it is said that a vote of the people was necessary in order to validate any new grant made at that time.

This is not the question that is presented here. It is not the contention of the appellee, so far as the Turner ordinance is concerned, that a new contract has been made since the amendment of March, 1890. Our contention is that the acts of the parties, the contemporary construction, and the enactments of the city, which are in *pari materia*, all tend unequivocally and with overwhelming force, to the conclusion that this contract as originally made and as construed for forty years, was a grant without limit as to time. We do not contend that we have here an uninterrupted series of new grants. We do contend that there is an uninterrupted series of transactions which demonstrate beyond room for controversy what the original true meaning and intent of the parties was.

1893, August 3d, the city solicitor and a committee of the council made a report touching the question of the liability

49

of the company for paving upon what is called the Walnut Street bridge. In this report reference is made to the resolutions of September 5, 1889, and to the ordinance of March, 1890, passed in conformity with them. In connection with the fact that there were parallel tracks here less than two blocks apart, it states (Transcript, p. 221):

> It will be seen therefore that this street railway has the right under the existing contract to operate its road on Walnut street, including the bridge thereon, without asking permission from the city council.

This report and the action of the council immediately following it are based upon the proposition that the parties were governed by the Turner ordinance as modified in connection with this consolidation, and especially by the compromise as to parallel streets.

1893, July 17th, the council passed a resolution (Ex. 111, p. 224) authorizing an extension of the track along Mulberry street from West 5th street to West 7th street, and thence north along 7th street to West Walnut street, providing that the tracks were to be laid and operated "in accordance with the ordinance of the city of Des Moines heretofore granted to it and its assignor, *the Des Moines Street Railway Company.*" There is but one ordinance that fills this description, namely, the Turner ordinance. Mr. Hippee testifies that under this resolution the tracks were built. By reference to the map marked Exhibit "B" it appears that these tracks parallel other tracks within a block of them, so that this resolution was necessary under the ordinance of March 8, 1890.

1893, July 24th, the resolution Exhibit 112, p. 225, was passed, authorizing the removal of a track, this being in conformity with the ordinance of March 8, 1890, which provided that no tracks should be removed without the consent of the city council.

In 1893 the present company was organized, and acquired not only the property of the Des Moines Street Railroad Company, but also the property of the other companies which had been operated after 1889 in connection with the Des Moines Street Railroad Company, so that in 1893 the entire property came under a single ownership as well as a single management.

(d) Transactions After January 1, 1898.

1895, February 4th, the city enacted an ordinance (Ex. 151, Tr., p. 292) granting to the Des Moines City Railway Company certain rights as to freight as well as to express and mail. The freight right was unlimited as to time. Section 8 of this ordinance was as follows:

> Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charters and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time.

The contention on the part of counsel for the appellant, that this ordinance amounts to a construction of the Turner ordinance as limited to thirty years (Appellant's Brief, p. 117) is based upon an entire misapprehension of the situation. This eight-year period terminated February 4, 1903. The thirty-year period of the Turner ordinance expired January 1, 1898. On July 11, 1903, after this eight-year period had terminated, this freight ordinance was amended (see Ex. 198, p. 333) by changing some of the streets over which freight might be carried, and by an express grant found in section 5, authorizing the Des Moines City Railway Company to operate interurban cars over all

of its tracks, expressly including the tracks upon the streets not described in the freight ordinance.

When the original freight ordinance and the amendment to it are taken together, and it is borne in mind that this amendment, which treated the freight right as existing and confirmed it for the future, changing only the designation of the streets, and which further granted interurban rights in all the streets, was enacted after the first day of January, 1898, this freight ordinance as amended, instead of sustaining the contention of counsel for the appellant, shows clearly that the city did not by this ordinance take the position that the rights of the appellee terminated on January 1, 1898. If the Turner ordinance had expired January 1, 1898, the rights under the freight ordinance (Ex. No. 51) would have thereupon terminated and there would have been nothing left to amend in July, 1903. By this amendment, enacted something over five years after it is now claimed that the Turner ordinance had expired, the city expressly negatived the claim that the Turner ordinance expired during the eight years after February 1, 1895, and by its interurban grant covering all the streets, affirmatively recognized the existing right of the Des Moines City Railway Company to operate its street cars.

Note in passing that the city in receiving and placing on file the acceptance of the freight ordinance on February 4, 1895, recites that the company built the wall that was part of the consideration for this ordinance (Ex. 152, p. 296).

The exclusive term under the Turner ordinance expired January 1, 1898. Within about five months, July 6, 1898, the city passed a resolution (Ex. 156, p. 298) which recites that in consideration of the agreement of the company to construct a certain track, the city will bring Jefferson street to the established grade, and will also relieve the company of any obligation to operate cars over this track

ien such operation is unnecessary. This resolution is solutely inconsistent with the contention that when it s enacted the company's rights had terminated. This ck, about 1,300 feet, was built in July, 1898 (Record, 555).

1898, November 3d, the company was directed by resolu- n (Ex. 157, p. 298) to lay certain track, with its center teen feet from the west line of Twentieth street "and in ier respects to conform to the ordinance regulating the et railways *now in force*." This is inconsistent with suggestion that there was no ordinance then in force horizing any track. The provision in the resolution re- iring conformity in other respects with existing ordi- nces is referable to the requirement of the ordinance of rch 8, 1890 (Transcript, p. 246) which required the cks to be laid so as to leave "as much room on either side roof as practicable," an exception being made as to this vision in the case of the track referred to. This track was lt in accordance with this resolution and was about 4,200 long (Transcript, p. 555).

899, March 28th, the city, after negotiations with the pany as to what fenders were most efficient, passed a olution directing the company to equip its cars with ders, and the fenders were installed (Transcript, p. 555). ere was no other company to which this resolution could e applied, and the date of this resolution was something a year after it is now claimed that the rights under this nance expired.

Ir. William H. Baily, counsel for the city, was em- red by the city in the year 1899 to prepare a revision he ordinances of the city which were then in force. On ember 14, 1899, he submitted his draft of this revision cord, p. 390), stating in his letter submitting the draft: is revision contains all ordinances *now in force*, as well etc. By a resolution adopted upon the same day (Tran-

script, p. 391) the city council adopted this revision, and ordered its publication in book form. Title 13 of this book commences on page 400 of the Transcript, and is the title covering street railways. Chapter 2 of this title, commencing on page 402, is the Turner ordinance. It is immediately followed (p. 406) by the amendatory ordinance of March 8, 1890. The consolidation resolutions, passed September 5, 1889, appear at page 414, and are the only street railway resolutions, as distinguished from ordinances, considered of sufficient importance to have a place in the revision. The city could not have more formally recognized the Turner ordinance as in force in 1900, some two years subsequent to the date when the city now contends that it expired. The reason for inserting the Turner ordinance in this revision was that it was then in force, and because the company was then operating under it as amended by the ordinance of March 8, 1890, pursuant to the consolidation resolutions of September 5, 1889.

It will be remembered that this re-enactment was not the first re-enactment of this Turner ordinance. This ordinance was re-enacted in 1869 as No. 28 of the revision of that date (Record, p. 633). It was re-enacted again in 1874 as No. 31 of the revised ordinances of that date (Transcript, p. 637). It was re-enacted in 1879 as chapter 47 of the revised ordinances of that date (Transcript, p. 642). It was re-enacted again in 1889, as chapter 53 of the revised ordinances of that date (Transcript, p. 650). Finally came this re-enactment of 1900. In his work on damages, section 474, Sutherland says:

> But where the statute is re-enacted without change the presumption is strong that the legislature intended it should be the same construction that had previously been given it.

Again, in Sutherland on Statutory Construction (2 ed.), section 403, it is said:

> In the interpretation of re-enacted statutes the court will follow the construction which they received

> when previously in force. The legislature will be presumed to know the effect which such statute originally had and by re-enactment to intend that they should again have the same effect. The same rule applies to the re-adoption of a constitutional provision. It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words. The same principle applies when a statutory provision is taken from a constitutional provision which has been construed.

In the case at bar, after in this petition of rehearing in 887 the city had formally construed this ordinance to be ermanent, after the Supreme Court of the State had granted s injunction without limit as to time, after the consolidaon, the city enacted the revisions of its ordinances of 1889 nd 1900. There is absolutely no room for question as to hat these re-enactments meant.

Following what we have quoted, *supra*, from section 403, he author says:

> The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it.

In 1900, more than two years after the city now claims hat the grant under this ordinance had expired, after the ty had for over thirty years by its practical construction reated it as permanent, it re-enacted this ordinance as then force. There is no way in which the city could have more ositively and conclusively negatived the claim which its ounsel now assert, that this ordinance was not then in orce and had expired more than two years earlier.

Exhibit No. 175 is a resolution adopted on the 31st day f July, 1900 (Transcript, bottom p. 307). It refers to hanges in the central loop of the company (Int. 171, *et q.*, p. 556). This loop was the heart of the entire street

railway system, and was utilized by every car operated by the appellee.

1900, September 26th, a petition was filed signed by C. C. Nourse and others, asking for an extension of the 20th Street line, which extension was built. This track was an extension of a line from the center of the city to an outlying district. The extension was of absolutely no use either to the petitioners or to the company unless the other track could be used in connection with it. Judge Nourse, who headed this petition, is an eminent lawyer and a member of the bar of this court, and had resided in Des Moines practically since the granting of the Turner ordinance, and must have known the accepted construction of it.

1901, June 20th, the city council passed a resolution (Exhibit 178, Transcript, p. 311) in the following language:

> Resolved, That the Des Moines City Railway Company be, and it is hereby authorized, when it extends its tracks on East Walker street and Easton Boulevard, to build and maintain the same on the north side of said streets, so that the south rail of the said track as laid shall be two and one-half (2½) feet north of the center line of said street.

Note that this resolution recognizes the right to extend as existing, but authorizes the location of the tracks at one side of the street instead of in the center. The right to extend was not granted, because this right existed; but because section 6 of the Turner ordinance (Transcript, p. 19) required the tracks to be laid in the center of the street, special authority to lay the track on one side was necessary. This extension was built in 1901, and was about 7,240 feet in length (Transcript, p. 557).

The McKay ordinance, which contemplated the grant of other street railway rights to a competing company, was considered by the city (Exhibit 186, p. 315). It will be observed that this ordinance, which was filed on the 3d day

of February, 1902 (Transcript, top p. 322), carefully avoids any of the streets in which the Des Moines City Railway Company had its tracks. Its right to occupy these streets was tacitly recognized.

1902, April 4th, by ordinance, provision is made for straightening Seventeenth street (Exhibit 190, p. 324). The line was rebuilt to conform to this change.

1902, August 5th, an ordinance was enacted (Exhibit 191, p. 325) authorizing the use of certain tracks for a limited time for freight purposes.

1903, April 20th, the company proposed to rebuild some track upon Grand avenue west of Fourteenth street.

The evidence shows (p. 558) that at this time the company had a single track from Fourteenth to Seventeenth street on west Grand avenue; that it removed this track, replaced it by a double track, and upon the recommendation of the board of public works and the city engineer, repaved the part of the street occupied by its tracks with brick on a concrete foundation.

1903, April 27th, a resolution was passed (Exhibit 193, p. 328) requesting the City Railway Company to relay its tracks on Grand avenue between west Sixth street and east Ninth street with a single or double track, and pursuant to this resolution there were built 10,844 feet of track (Transcript, p. 559). There was a parallel track distant only one block, so that under the Turner ordinance as amended (but under no other ordinance) this resolution on the part of the city was necessary.

1903, June 15th, the city passed a resolution (Exhibit 199, p. 336) directing the board of public works to notify the company to pave the portion of east Walnut street, from Eleventh street to Eighteenth street, occupied by its tracks. On the same day it passed a like resolution as to pavement on east Twelfth street from Grand avenue to Washington avenue (Exhibit 200, p. 336). A similar resolution was passed August 3, 1903. Under the laws of the State of Iowa

the company had the right to pay the assessments for this paving in seven annual installments.

1903, August 17th, upon the petition of various citizens, the city required an extension of the west Fourth street line (Exhibit 202, Transcript, p. 337), and the extension which was about 1,700 feet long was built (Transcript, p. 560).

1903, September 8th, the city enacted an ordinance to prevent accidents at the waiting room (Exhibit 204, Transcript, p. 338). It appears (Transcript, p. 560) that the waiting room is the central station upon the loop of the appellee. All cars pass it, and as a consequence traffic at this corner is congested.

1903, September 21st, another resolution was passed pursuant to the amendment to the Turner ordinance, authorizing the construction and maintenance of certain tracks upon parallel streets less than two blocks apart (Exhibit 205, p. 339; also Transcript, p. 560, 561).

1903, November 17th, a resolution was passed reciting that a certain bridge was being constructed in the city and that the company expected to occupy it with its tracks upon its completion, and ordering that the tracks be built and poles and wires erected while the bridge was in course of construction, and prescribing the character of the poles to be used. These poles had been purchased (Transcript, p. 561) but had not been installed at the time the testimony was taken, because the work upon the bridge had not then progressed sufficiently.

Prior to that time, nothing but wooden poles had been used. Later, in co-operation with the city, iron poles were installed in a portion of the business district (Transcript, p. 561). See also the ordinance Exhibit 215, p. 346. Tracks were reconstructed so as to comply with the requests shown in Exhibits 216 and 217 (Transcript, p. 562). The company was permitted at its own expense to bring Madison Square avenue to a practicable grade between Fountain avenue and Summit street (Exhibit 218, p. 348) so that tracks could be laid across it (Int. 230, p. 562).

Practically all of the company's track has been rebuilt since January 1, 1898, the day when it is now claimed its rights expired. The company had on the 31st day of December, 1905, 76.49 miles of track. On January 1, 1898, it had 38.71 miles. After that date it built of new track 37.78 miles and rebuilt 25.925 miles of old track, so that of the 76.49 miles of track in existence on the 31st day of December, 1905, only 12.78 miles had been built prior to the time when it is now claimed that the rights under the Turner ordinance expired (Transcript, p. 540). During the same period the company made large improvements and additions to its power house, shops, equipment, etc. Mr. Hippee says, at page 563:

> Since that date the company constructed a new fireproof power building, in which are located two engines and two direct connected generators; each of these generators are 1,000 K. W. There is also in this same building a new boiler plant, consisting of 8-140 horsepower each water tube boilers, with the necessary stokers, pumps, pipes, fittings, condensers, and all different fixtures that go to make a complete and efficient power plant for the purpose of generating power for the operation of cars of this company and the Interurban Company. The old power plant was about 1,225 horsepower. The old engines and generators are maintained for use in emergencies. We also constructed shops of the size 137 x 252 feet. This building is two stories high, of brick; it is not of fireproof construction. It is what is called an improved slow burning construction. The building in which the shops are located is divided into a repair section in which cars are repaired and overhauled. The machine shops, in which the heavy iron working machinery is located, blacksmith shop, adjoining the machine shop, which is equipped with necessary machinery to furnish a complete blacksmith shop as an adjunct to the machine shop; the armature repair shop, in which all armatures and all electrical appliances used about the cars and machinery are repaired and overhauled. There is also located in this building a wood-working shop in which various pieces of

wood-working machinery are installed; this is used in repairing and rebuilding old cars and building new cars. We have facilities in these shops to build complete car bodies, new clear through. There is also located in these shops a paint department in which new cars are painted and finished completely, and the old cars are repainted, revarnished and renewed.

In the second story of this building is located the storehouse department in which the supplies that are used around the shops and power plant, line department, track department, and in fact all the departments of the road, are received and distributed. This company also constructed and built a car barn on west Twenty-fourth and Ingersoll avenue, size 125 x 252 feet, with a capacity for housing and taking care of 80 cars; there is also constructed an addition to the Second street car barn with a capacity for housing in addition about twelve cars.

During this entire period, there was not a suggestion by the city that the Turner ordinance had expired (Transcript, p. 564). The doing of this work was notorious. Both the city and citizens of the city knew that the work was being done and that large amounts were being invested by the company in it. The city admits in its answer that it knew this money was being expended and that the company claimed these rights (Transcript, pp. 25 and 26). If the city had the power to pass the resolution of November 21, 1905, it had the power to pass a like resolution the day after this money was invested, and to immediately destroy the investment. This is not a case where the city was authorized by law to purchase, or had reserved an option to purchase the property; consequently either both the city and the company understood when these investments were being made, that they were being made upon the strength of the rights granted by the Turner ordinance, or else they both understood that this money was being practically thrown away, that it was being invested subject to the caprice of any city council that might be elected, and that the better and more permanent the character of the work, the greater would be the hazard

of loss on the part of the company. It is utterly impossible to believe that either the company or the city believed that this investment was being made without some right in the street constituting to the company an assurance that the money was not absolutely thrown away.

In 1889 the city enacted an ordinance (Transcript, p. 546) providing that street railroad companies should pave five feet in width, which was the space between the rails, except in the case of the Narrow Gauge Company, where the rails were three feet apart. This ordinance was accepted by the various companies (Transcript, p. 548).

In the aggregate, under assessments for paving of this character, the company has paid about $120,000 (Transcript, p. 549). After January 1, 1898, the city continued to levy these assessments. It levied one of these assessments for about $6,000 on November 21, 1905, the day on which the resolution in controversy was passed (Transcript, p. 550), and it levied a like assessment on the 2d of January, 1906, the day after the answer in this suit was filed. A statement of these assessments made after January 1, 1898, as shown by the evidence of Mr. Hippee, is as follows:

March 6, 1899	$5,198.11
March 31, 1899	4,577.75
July 3, 1903	3,278.21
Nov. 2, 1903	73.40
Feb. 15, 1904	2,581.32
March 24, 1904	7,301.00
Dec. 30, 1904	3,022.00
Feb. 20, 1905	1,058.00
Nov. 21, 1905	5,933.62
Jan. 2, 1906	1,040.39
	$34,064.10

As an illustration of the procedure as to such paving, see Exhibit 226, p. 352, which directs the company to improve by paving in accordance with a contract therein referred to. It will be observed that the paving is done pursuant to direct

affirmative action by the city, so that it cannot be suggested that this was a matter of inadvertence. The assessments referred to are on account of paving ordered upon streets theretofore occupied by tracks.

In 1897 the State enacted a law requiring street railroads to pay the value of paving taken by them where their tracks were laid upon streets improved before the tracks were constructed (Code of Iowa, 1897, section 835). Under this section the city, on December 30, 1899, enacted an ordinance providing the method of ascertaining the value of pavement so taken (Transcript, p. 552). As illustrating the procedure, see Exhibit 207, p. 340. The board of public works makes a return of the value of the pavement. This is approved by the council and is followed by a direction (Exhibit 208) as to the distribution of the money paid in among the abutting property owners.

After January 1, 1898, tracks involving assessments of this character were laid to a length of 26,923.3 feet (Transcript, p. 553). In each instance where the company was about to lay one of these tracks the city acquiesced in its right to do so, and instead of objecting, made the assessment, accepted the money, and distributed it among the abutting property owners (Transcript, p. 584). The amounts paid in each year on this account, as shown by the testimony of Mr. Hippee (Transcript, p. 554), are as follows:

Sept. 14, 1903	$1,210.22
Sept. 15, 1903	2,277.88
Oct. 15, 1903	1,670.53
Oct. 15, 1903	1,325.76
Aug. 15, 1904	347.05
May 12, 1905	620.42
May 15, 1905	368.28
June 15, 1905	986.67
	$8,806.81

From time to time, commencing with October 1, 1889, the companies have issued bonds to provide funds for extensions,

additions and betterments, commencing with the consolidation of 1889. Most, if not all of the investments were made pursuant to the order of the city, or with its formal consent, made a matter of record. These bonds have been sold to the firm of N. W. Harris & Co., and by them have been sold to investors through the United States, principally in the eastern States (Transcript, p. 68). It appears from the deposition of Mr. N. W. Harris, commencing at page 67, that this firm first purchased 600 bonds on October 1, 1889, at 95 plus accrued interest, of which bonds there are now outstanding $390,000. Of a subsequent issue dated May 1, 1893, N. W. Harris & Co. purchased $291,000 at prices ranging from 80, immediately after the panic of 1893, to 100 per cent of the par value of such bonds, and $4,000 of these bonds are now outstanding. There was another issue dated April 1, 1901, more than three years after it is claimed these rights expired, and when it is now claimed the company was a trespasser or at best a mere licensee, of which N. W. Harris & Co. purchased $2,195,000 at prices ranging from 90 to 97½ cents and accrued interest. As already stated, these bonds have been sold to numerous investors, principally in the eastern States. The deposition of Mr. Harris shows various circulars issued in order to sell these bonds, and shows that in each instance the bonds were purchased by N. W. Harris & Co. in reliance upon the permanency of the Turner ordinance, and were sold by N. W. Harris & Co. under representations that the rights under this ordinance were permanent. It further appears that in connection with this matter there was furnished to N. W. Harris & Co. for the use of their counsel a printed copy of the ordinances of 1900 prepared by Mr. Baily which recognized the Turner ordinance as still in force The present outstanding bonded debt is $2,924,000, and every dollars of the proceeds of these bonds has gone into this property.

Every one of these trust deeds is a matter of public record, and it was notorious that the company was borrowing this money and making these investments. The answer (par.

21) admits the expenditure of larger sums, and (par. 23) that the company has "always claimed the right to build, extend and operate its street railways upon the streets of the city of Des Moines."

This review of the facts covers a period of almost forty years. There is no dispute as to any of these facts, nor is there any evidence of any facts which are inconsistent with them. We submit that this demonstrates beyond controversy that when this contract was entered into by the enactment and acceptance of the Turner ordinance, it was the intention of both parties that the grant made should be without limit as to time; that it demonstrates further that for almost forty years both parties to the contract have consistently acted upon this construction, and have by their acts confirmed it as the meaning of the contract. There is no claim that the company has not performed its duty to the public. There is no complaint that the facilities are not adequate or that the service is not excellent. In reliance upon this contract over half a million dollars in profits have been put into the property (Transcript, p. 546). In addition to the original investment in the stock and in addition to these profits, about $3,000,000 have been raised by the negotiation of bonds now held by innocent investors. Under these circumstances, may the city say that it is not bound by this contract—that it will destroy this investment, not because the company is not performing its duty to the public, nor because it claims the service is not adequate or that it is in any respect insufficient, but because it believes that if it may repudiate this contract, this will place the appellee in a position where the city can drive a hard bargain and where it can force the appellee to buy back at a dear price what it now owns and has owned for forty years?

Common honesty should be as commendable in the business transactions of a municipality as it is in the business transactions of a private corporation. As we shall see, the courts have applied to municipalities in the exercise of their proprietary powers the same rules that have been applied to

individuals. When the city, through a long course of dealing with this company and its predecessor, construed this grant as unlimited, when in 1900 it published it as an ordinance then in force, and furnished that publication to N. W. Harris & Co. to be used by their counsel in determining questions underlying the issues of bonds, it gave to this contract a construction which it cannot now question to the injury of those who relied upon it and invested their money upon the faith of it.

In the *Street Railway Cases* reported in 73 Iowa, a question arose as to the effect of some of the earlier revisions of the city ordinances of the city of Des Moines and it was contended there that they amounted to nothing because they had not been enacted with the formalities that should attend the enactment of an ordinance as distinguished from a resolution; and it was said that the ordinance adopting the revision was void because it embraced too many subjects. In this case the Supreme Court of Iowa said, at page 522:

> For the purpose of the opinion, it may be conceded that what purports to be an ordinance did not take effect as such, but it appears to us that it has the force at least of a resolution, so far as the provision in question is concerned. Plaintiff's assignor acted upon it and expended money not only in laying additional track, but in paying for street paving. We feel justified in saying that every one understood that the ordinance of 1866 was ratified and binding upon the city and the plaintiff's assignor, and that what was done afterwards was done with that understanding.

This rule of conduct, applied by the Supreme Court of the State of Iowa in 1887 in a litigation over this very ordinance between this city and the appellee's assignors, charges the city with notice that the same rules of construction will be applied in the future, and authorizes the company to rely upon them. It was a formal notice to the city of the consequences which would follow its concurrence in this construction of the ordinance by the public and by the com-

pany. This case established at least in equity what might be called *a rule of property* upon the faith of which the company acted, and by which as a necessary correlative the city is bound.

It is difficult to imagine language more appropriate to the present situation than that used in this quotation from the Supreme Court of Iowa. To paraphrase the language of the court, is there any doubt as to whether the testimony justifies us in saying that every one understood after 1898 that the Turner ordinance was binding upon the city and upon the appellee, and can there be any doubt that what was done thereafter was done with that understanding by both parties to this contract?

II.

That the ordinance in question constitutes a contract has been authoritatively determined, so that there remains only the question of construction.

Reference has been made to the decision of the *Street Railroad Cases*, 73 Ia., 513, 75 Ia., 585, and *Des Moines City Railway Co. vs. City of Des Moines*, 90 Ia., 770. These cases adjudicated the validity of the Turner ordinance as a contract between the City of Des Moines and the Des Moines Street Railroad Co., and recognize the present company, the assignee of the Des Moines Street Railroad Co., as the holder of the rights granted by this ordinance.

In *Des Moines City Railroad Co. vs. City of Des Moines*, *supra*, the court said:

> The plaintiff is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions

arising under that ordinance were considered by this court in *Des Moines Street Ry. Co. vs. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 515, *Id.*, 74 Iowa, 586. It was held in those cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the Street Railway Co.

These cases finally dispose of all questions as to the validity of this contract as a contract between the company and the city, and eliminate all questions now urged as to the power of the city to make this contract, as to whether such contracts are in accord with sound public policy, as to whether they are assignable, and all other questions which go to the validity of the contract as a contract. They determine the duration of the exclusive grant, and recognize we believe the permanence of the general grant. It is contended that this is not formally adjudicated, and consequently that there remains for determination the duration of this right. This is purely a question of construction. No question is presented as to whether there is a contract, or as to whether the statutes of Iowa authorized the city to make this contract, or as to whether the public policy of Iowa permits such contracts, because all of these questions have been determined by the Supreme Court of the State in litigation between the parties to the present action. These matters were adjudicated over twenty years ago, and ever since this adjudication both the city and the company have been acting in reliance upon it, as is demonstrated by the facts to which reference has been made.

We therefore pass directly to this question of construction without at this time referring to the authorities which amply sustain the conclusion of the Supreme Court of Iowa as to the validity of this ordinance.

III.

The grant in the Turner ordinance of December 10, 1856, is without limit as to time.

Section 1 of this ordinance is the general grant. Section 10 is not a limitation upon this grant, but is an addition to it, making the right granted under section 1 exclusive for the term of thirty years. These two sections are as follows:

> SEC. 1. *Be it Ordained by the City Council of the City of Des Moines*, That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines with all necessary and convenient tracks for turnouts, side-tracks, and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables or car-houses, and over the bridges and such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed.
>
> SEC. 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

We submit that it is clear that section 10 was intended to confer an additional right, namely, an exclusive right, and that it is not intended as a limitation upon the general grant contained in section 1.

If the rights under this ordinance are limited to thirty years, counsel concede that the purpose to create this limitation must be found in the language in section 10 "the right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years" The appellant, attempts by this language, clearly intended to add to the original grant, not to take something away from it. That this construction of this section is unsound is manifest.

(a) It does not come within the scope of the section, which deals solely with the exclusive right.

The section contains but a single sentence, the first portion of which says affirmatively that the right shall be exclusive. The remainder of the sentence, to protect this exclusive grant, provides that until the expiration of said term the city shall grant no rights which will interfere with or impair it. This section deals with nothing except this exclusive right. This is manifestly the construction which the Supreme Court of Iowa placed upon it. In the

Street Railway Cases, 73 Iowa, 513,

the court says at page 517, in answer to the contention that the exclusive right was merely the right to exclude others from operating over the roads constructed by the grantee:

> In our opinion, however, the meaning of the provision is the same as if it read, "the right herein granted to said company to operate said railway shall be exclusive" of other street railways. It was not necessary to provide by ordinance that other persons should not run cars on the plaintiff's assignor's track, nor obstruct its cars; and no one, we think, looking at the ordinance, can suppose that that was all that was intended. So far, the plaintiff's assignor's right would be exclusive by reason of the mere right of property, and without any ordinance. If anything more were necessary we find it in the very section of the ordinance under consideration. It is provided in the same section, and same sentence, as follows: "And the said

> city of Des Moines shall not, until the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." The right granted was to lay and operate a track on all the streets of the city. The construction and operation of a rival railway would impair the plaintiff's rights. It might not constitute a physical interference, but it would impair, if not destroy, the plaintiff's enterprise, so far as the profits were concerned; and those, we may assume, constituted the sole object of the enterprise. We cannot think that there is any reasonable doubt about the meaning of the ordinance. *We think that the city undertook to exclude rival companies which would interfere with the profits of the company for whose benefit the provision was intended.*

In other words, the Supreme Court of Iowa limits the latter part of this sentence to this exclusive grant. It construes it to have for its purpose the prevention of anything which might interfere with the exclusive right conferred by the first part of the sentence. It treats the sentence, which constitutes the section, as dealing with but a single thought, namely, the creation and preservation of an exclusive right for a limited period. If this be sound this sentence is something separate and distinct from the grant contained in section 1 and was not intended to affect that grant as a limitation upon it, but was intended to add and preserve a separate, distinct, additional right.

(*b*) The words "after the expiration of said term" are significant.

If the purpose had been to limit the grant to thirty years and to make the grant exclusive for its entire term, the words "until after the expiration of" could not have been used, for then they would have been inapt; the single word "during" found in the Indianapolis section would have been retained.

The language used here is inconsistent with the conten-

tion that by this section the city reserves the right to destroy the general grant at any time after the expiration of thirty years. The language is, that the city shall not, until after this term has expired, grant to or confer upon any person or corporation privileges which will impair or destroy, etc. The right which it reserves to itself, and which it does not grant it away, is, after the expiration of thirty years to grant to other persons or corporations privileges which would impair or destroy any exclusive right if it were in existence. In other words, the purpose was to make it clear that after the expiration of the thirty years the city should have power to do, what it had contracted not to do during that period. It did not undertake after that time to exclude rival companies which would interfere with the profits of the company for whose benefit this provision existed during the thirty years. This section, as construed by the Supreme Court of the State, means that the city said it would not, until after the expiration of the exclusive term, grant rights to other companies which might interfere with the profits of the company exercising the rights granted under this ordinance. If the ordinance was to end with the thirty years there was no occasion for any reference to the rights of the city thereafter.

(*c*) The words "impair or destroy" are significant.

If the rights granted by the ordinance had terminated at the expiration of thirty years, there would have remained absolutely nothing which could have been by any action of the city thereafter, affected in any way, much less impaired or destroyed. In other words, the language of the ordinance clearly and unequivocally recognizes the fact that under it there would be in existence rights, after the expiration of this thirty-year period, which might be affected by the acts of the city in granting like rights to others; and the city made it clear that its power with reference to the grant of such rights to others, should be after the expiration of the thirty-year term, wholly unrestricted by the provisions of the ordinance.

(*d*) This section if rewritten in the language of the Supreme Court of the State, in the extracts which we have made from its opinion, would read as follows:

> The right herein granted to said company to operate said railway shall be exclusive of other street railways for thirty years; and the city undertakes that it will not, until after the expiration of said term, grant rights to rival companies which would interfere with the profits of the company for whose benefit this provision is intended.

This is exactly the construction which has been placed on this ordinance since its enactment by every company that has operated under it.

(*e*) The opinion expressly recognizes an obligation on the part of the company to make such extensions as may be necessary to furnish adequate service to the public.

Such extensions must obviously be made continuously. The company had not the right to cease making extensions five years or ten years before the thirty-year period expired; and yet it is unreasonable to believe that either the city or the company understood that the extensions were to be made up to the end of term without a possibility of a return.

(*f*) The opinion clearly treats these grants as separate grants. It says:

> In 1865 the city council of Des Moines passed an ordinance whereby it granted to the plaintiff's assignor, a company organized as a street railway company, the right to lay a single or double track along all its streets. The same ordinance provided that "the right herein granted to said company to operate said railway shall be exclusive for the term of thirty years." Many other provisions were made, not important to be set out.

This statement of the substance of the ordinance is inconsistent with the theory of the appellant. The court treats it first as a grant of a general street railroad right,

and second as a grant of an exclusive right for the term of thirty years.

The argument of the apellant is predicated solely upon the words "and for the time," which are found in the first section of the ordinance. It is said that the time there referred to is the thirty years mentioned in section 10. The argument of counsel is, that there is no other time mentioned to which they can refer, and that therefore they refer to this. They ignore the fact that to force this construction it is absolutely necessary to override the plain meaning and intent of the provisions of section 10. In other words, to make the two sections accord with their theory, they must absolutely overrule the express provisions of one of them. By a similar course of reasoning, this language might be made to refer to any section in the ordinance where time is mentioned. For instance, in section 7 it is said that the rate of fare shall not exceed ten cents for five years after the first mile of track is completed; but note that the section says that thereafter the rate shall not exceed six cents, without any limit as to time. Again, time is referred to in the ninth section with reference to the construction of the tracks. The ordinance is not to become effective unless certain conditions are complied with, and the rights granted may be forfeited on the happening of certain contingencies. Again, the year 1875 is referred to in section 11.

Before it can be successfully contended that two provisions in two sections are interdependent, counsel must at least show that to so link them together would not do violence to any express provision of either of the sections.

The argument that the use of the words "and for the time" *ex necessitate* requires something later in the ordinance in the nature of a limit, upon the grant is conclusively answered by the fact that the city of Des Moines in enacting Exhibit "62" (Transcript, page 154), already referred to, and, in re-enacting as a part of the Revised Ordinances of 1900, the

North Des Moines ordinance (page 429) included there words in each of these ordinances, notwithstanding the fact that the grant in each is unlimited as to time.

In

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234-248,

the Supreme Court of Iowa refers with approval to *Railroad Co. vs. Nave*, 38 Kan., 744. We quote from the Cedar Rapids case as follows:

> In the same general direction is the holding of the Supreme Court of Kansas in *Railway Co. vs. Nave*, 38 Kan., 744 (17 Pac. Rep., 587, 5 Am. St. Rep. 800). In that case the railway corporation obtained a grant for the occupancy of the street, and to construct its road within six months from the date of the ordinance. It failed to perform the work within the time limited, and, upon attempting to proceed thereafter, injunction was sued out by an owner of abutting property. The court says: "The contention that the privilege granted by the ordinance remains until a forfeiture is declared is not sound. *The permission conferred by the city was for a limited time, and when that time expired the privilege no longer existed.*"

Railway Company vs. Nave, supra,

involved a right to construct a railroad in a street, subject to certain conditions, and subject to these conditions, unlimited as to time. The Kansas court in the portion of its opinion approved in the *Cedar Rapids* case construes such a grant to be first for the limited time within which the conditions are to be performed, the grant becoming unlimited only upon their performance. We quote from the Kansas case an excerpt, including the quotation made in the *Cedar Rapids* case.

> *The permission conferred by the city council was for a limited time, and when that time expired the privilege no longer existed.* The grant is not an

> irrevocable one which continues indefinitely, to be accepted or rejected at the option of the company. The consent of the city council to occupy the street is a mere license, and, until the company has availed itself of the license, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires the license lapses, and no revocation is needed to terminate the same. The railway company, or licensee, cannot thereafter occupy the streets, or build its road thereon, without a new permission from the city authorities.

If the doctrine of these cases is accepted, then under the provisions of section 9 this grant was, in the first instance, a grant for a limited time, until the first of January, 1869, when the first mile of track was to be completed. Upon a compliance with this condition the grant was extended until the first of January, 1871; upon compliance with the further condition it was extended until the first of January, 1873; and upon compliance with the final condition its character changed from a mere license to a contract unlimited as to time. This construction does not do violence to any of the provisions of the grant, and it is the only construction that can be adopted without conflict with the *Cedar Rapids* case, *supra*.

Furthermore, as suggested in the opinion of Judge Dillon, printed as an Appendix to this brief, these words may readily be referred to the exclusive right, giving force and effect to each provision of the ordinance without doing violence to any of its provisions.

If the *Cedar Rapids* case is not in point, we have section 1 providing that the grant is for the time and upon the conditions hereinafter mentioned, without any time stated to which this provision can be referred. This means, upon its face, that the grant is without limit as to time. Suppose

the grant were "upon the conditions herinafter mentioned, and there were no conditions mentioned; clearly it would be a grant without conditions, not subject to conditions.

The right granted is in the nature of an easement. "An easement is a *permanent* right conferred by a grant or prescription, etc." (162 N. Y., 126). Suppose A granted B an easement to cross his piece of ground "for the time and upon the conditions hereinafter mentioned," without imposing any time limit, can there be any doubt about the construction of such a grant?

The argument of counsel that the word "limitation" in section 14 of the ordinance relative to its acceptance, is in the plural is not persuasive. With reference to this matter counsel say:

> Section 14 of this ordinance provides that "within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grant hereinbefore made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company," etc. From this section it will be seen that the company accepted the ordinance with the full knowledge that certain limitations were expressed in it. Certain conditions were named in the ordinance and certain regulations were made for the laying down of the tracks and operation of the cars, and certain limitations were made as to the duration of the grant. If the duration of the grant were unlimited as to time, and the exclusive privilege granted in section 10 was the only limitation contained in the ordinance, section 14 would have provided that the acceptance must be by the company with the conditions, regulations and limitation above expressed. But it must have been clear in the minds of the city council when the ordinance was passed that there were two limitations, one limitation referring to the general grant as a grant, and the other referring to the term or duration of the exclusive or prohibitive feature of the grant. If this were not true this por-

tion of the ordinance was meaningless when the company accepted the same.

The ordinance is full of limitations. Section 1 limits the company to such alleys only fronting on which said company has depots, etc. Section 2 limits the power to animal power and forbids connections with other railroads and the use of the cars of other railroads. Section 3 limits the use of the tracks to the transportation of passengers and their ordinary baggage and the company's material. Section 4 limits the grade of the tracks and requires it to conform to the grade of the street. Section 5 is intended to limit the obligations of the city. Section 6 limits the right of the company as to the location of the tracks. Section 7 limits the rate of fare. In this way we might go through the entire ordinance. The fact is that the grants in the ordinance are contained in sections 1 and 10, the one granting the general right and the other the exclusive right, and the remainder of the ordinance consists of limitations, conditions and regulations imposed upon the rights granted by these two sections.

Our consideration of this ordinance has been confined to the ordinance itself. The ordinance standing alone clearly and unequivocally grants a right unlimited as to time. No other interpretation of it is possible without violating every established canon of construction.

IV.

A grant unlimited as to time is permanent.

This proposition is settled, so far as this court is concerned, in

Detroit vs. Detroit Citizens' St. Ry. Co., 184 U. S., 369-394.

In commenting upon the question whether the Detroit Company could accept a grant extending beyond its corporate life, the court says:

A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. It at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, particularly by virtue of section 15 of the Street Railway act above set forth, any company itself having corporate existence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company and others vs. City of Detroit*, 12 C. C. A., 365; same case, 64 Fed. Rep., 628. In the course of the opinion of the court in that case, the cases of *People vs. O'Brien*, 111 N. Y., 1, and *Miner vs. N. Y. Central Railroad Company*, 123 N. Y., 242, were cited. People *vs.* O'Brien is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, *and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad;* the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case in 123 N. Y. announces the same doctrine. It is not a new one and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of

its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee.

The leading case upon this question is

People vs. O'Brien, 111 N. Y., 1,

which is cited with approval in the Detroit case, just referred to. In that case the court said (p. 38) as to the duration of such a grant:

> This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll vs. Railroad Co.*, 12 N. Y., 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.
>
> The title to streets in New York is vested in the city in trust for the people of the State, but under the constitution and statutes it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity which should be irrevocable. (*Yates vs. Van De Bogert*, 56 N. Y., 526, *In re Cable Co.*, *supra*.)
>
> Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity, for the purposes

of a street railroad. (*People vs. Sturtevant*, 9 N. Y., 263; *Davis vs. Mayor, etc.*, 14 *Id.*, 506; *Milhau vs. Sharp*, 27 Id., 611; *Mayor etc. vs. Second Ave. R. R. Co.*, 32 *Id.*, 261; *Sixth Avenue R. R. Co. vs. Kerr*, 72 *Id.*, 330.)

Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

The case of

Louisville Trust Co. vs. Cincinnati, 76 Fed., 296,

is cited with approval in *Blair vs. Chicago*, 201 U. S., 400, 486. We quote from page 315 of the opinion in the Louisville case as follows:

> The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street car company, having the requisite franchise from the state. The act limiting the power of a city to a term not exceeding twenty-five years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets.

A strong case bearing upon the question decided by Mr. Justice Brewer is

Kansas City Waterworks Cases, 65 Fed., 691.

We quote, commencing on page 695, as follows:

> The other exception embraces two matters: First, the permanence of the right to use the streets and alleys of Kansas City, Kan., for a flow line; and second, the interests of Kansas City, Kan., in the supply station at Quindaro.

With reference to the first, it appears that on November 17, 1891, the city council of Kansas City, Kan., passed an ordinance, the first section of which is as follows:

SECTION 1. That for and in consideration of the sum of ten thousand ($10,000) dollars to it paid, the city of Kansas City, Kan., does hereby sell and transfer to the National Waterworks Company of New York, its successors and assigns, whether such successors and assigns be a natural person or a municipal corporation, located in this or any other State, the right to lay and maintain water mains under or over any stream and along, upon and across the streets, alleys, and other public grounds of the city of Kansas City for the purpose of conveying water to any city in this State or any other State; and there is also sold and contracted to said National Waterworks Company of New York, its successors and assigns, aforesaid, the right to maintain any and all water mains heretofore laid under, along, upon and across any such streets, alleys and other public grounds.

The ordinance was accepted and the $10,000 paid. There was no limitation expressed as to the matter of time, *and the language imports permanence of right, for it is "to lay and maintain."*

Note that section 1 of the Turner ordinance (Exhibit A, Transcript, p. 18), not only grants the right to construct and take, but also "to keep, maintain, use and operate."

In

State vs. Commissioners, 61 N. J. L., 470, and
State vs. Traction Co., 62 N. J. L., 386,

two causes which arose out of the same transaction, this rule was applied.

In

State vs. Ladies of the Sacred Heart, 99 Mo., 533,

the same rule is applied in the construction of a grant to be a corporation which is without limit as to time.

Suburban Elec. L. & T. Co. vs. East Orange, 41 Atl., 865,

affirmed in 44 Atl., 628, but not reported in the official reports of the State, involved a statute authorizing the plaintiff company to string wires, etc., provided that in all incorporated towns the consent of the town authorities should be obtained, specifying the streets, etc. Consent was given, poles were set and wires strung. The town afterwards attempted to withdraw its consent, claiming the grant was a mere license revocable at will. The court rejected this claim and held that since no time was fixed it was perpetual and irrevocable. Note the language of the opinion at 41 Atl., 867:

> No time is fixed by the legislative authority for the continuance of the exercise of the franchises and the grant must be presumed to be perpetual.

In

State ex rel. vs. Mayor, etc., of Jersey City, 49 N. J. L., 303,

it was held that a city cannot revoke a designation of streets in which a telegraph company may place its poles after the company has conformed to the conditions and expended money in reliance upon the consent, such consent being given under statutory authority, the court said:

> I am of the opinion that, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles made in reliance upon the municipal designation, the company obtains a vested right, of which they cannot be stripped by a subsequent revocation of such designation. The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a

moment. A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the *Dartmouth College Case*, 4 Wheat., 518, to the present time. *State vs. Blake*, 35 N. J. Law, 268, and cases cited on page 215. The power to repeal, suspend and alter charters contained in section 6 of the act concerning corporations (revision 178) does not reach the exercise of the authority attempted by the common council. No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the legislature; and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired.

It was undoubtedly competent for the common council to couple with the permission such reasonable conditions as the occupancy of a public street by a telephone company's posts and wires would suggest; and without such conditions the erection and maintenance of appliances of the business of the company would be subject to the reasonable control of municipal by-laws. *Dill. Mun. Corp.*, secs. 555, 558, 575. But that the common council has the power, at its mere will, to annul the act, which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance which can be at once abated, and their business thus destroyed, I cannot admit.

In *Railroad Co. vs. New Orleans*, 46 La. Ann., 526, the court says:

In the case of *City of New Orleans vs. Telephone and Telegraph Co.*, 40 La. Ann., 41, the court said:

Obviously upon the clearest consideration of law and justice, the grant of authority to defendant when accepted and acted upon became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations

> therein. Such has been the well recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat., 518.
>
> The city of New Orleans can as a matter of right refuse to grant the authority for a passage through its streets of a railroad. It can also demand a price for the privilege. But it can also as a matter of right, if it deems the exercise reasonable and proper grant the right of way to a railroad extending its lines into other territory without a compensation in money, but for other considerations.
>
> In the instant case the council has granted to a railroad company a right of way through certain streets for the purpose of operating its road beyond the limits of the city. The grant has been accepted, and except for a violation of its terms is irrevocable.
>
> *Africa vs. Mayor, etc.*, 70 Fed., 729.

was the case of the organization of a corporation under general statutes to operate a street railroad, the consent of the municipality being necessary for the laying of the tracks. It was held that since the ordinance granting the consent was without limit as to time, this consent continued so long as the right to be a corporation existed. While this case was reversed by the Circuit Court of Appeals, it was upon grounds not involving this question. Upon the appeal (77 Fed., 508) it was said:

> The consent when given by ordinance duly passed, constitutes a grant of a right of way on and over the streets named or described in the ordinance and *constitutes a contractual ordinance, conferring an easement which is irrevocable.* By such an ordinance an incorporeal hereditament is created and vested in the grantee.
>
> *Trustees of Southampton vs. Jessup*, 162 N. Y., 122,

involved a resolution stating that Jessup "is hereby given liberty to make a roadway and to erect a bridge across the

Great South Bay," etc. At page 127 the court says as to this grant:

> It is a special privilege because it is not of common right; it is permanent because there is no limitation as to time, and is of public concern because it relates to the public domain.

Seattle vs. Columbia, etc., Railroad Co., 6 Wash., 379,

involved an ordinance of the city of Seattle granting the right to construct certain tracks in the streets. In this case, at page 392, the court says:

> Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents.

Port of Mobile vs. Louisville & Nashville R. R. Co., 84 Ala., 115,

was a bill by a railroad company to enjoin the enforcement of a municipal ordinance, the bill being predicated upon the claim that the ordinance in question interfered with rights

which the company held under an earlier grant from the city. This grant was without limit as to time and was held to be irrevocable.

In *Milhau vs. Sharp*, 27 N. Y., 611, a street railroad right was involved. In holding the right perpetual the court says:

> I say perpetual, because there is no limitation in point of time to the continuance of the franchise and no direct power is reserved to corporations to terminate it.

It will hardly be contended that the grant is limited to the duration of the corporation. In

> *Detroit vs. Detroit Citizens' St. Ry. Co.*, 184 U. S. 394,

to which reference has already been made, this court expressly held a grant extending beyond the corporate existence to be good. In

> *People vs. O'Brien, supra,*

the corporation had been dissolved under an act of the legislature, and the question was whether the grant survived it and should be sold like other property of the corporation in winding up its affairs, and it was there determined that this right was property, to be disposed of like any other property. In

> *Blair vs. Chicago, supra,*

the doctrine of the Detroit case just referred to was reaffirmed, and the court says, at the bottom of page 481:

> In reaching this conclusion, we are not unmindful of the decision of this court in *Detroit vs. Detroit Citizens' Railway Co.*, 184 U. S., 368, 395, holding that although a corporation be organized for a limited period by the terms of its charter, it may receive a grant which would inure to the benefit of those lawfully entitled to succeed to the rights of the corporation, although for a period of years beyond the corporate life.

Not only the Turner ordinance runs to successors and assigns, but this is true of nearly every other ordinance introduced in evidence. The Des Moines Street Railway Company was organized in 1866 for a period of fifty years. (See article IV of its articles of incorporation, Transcript, p. 74.) At that time it was provided by the laws of the State of Iowa, under which it was incorporated (revision of 1860, section 1151) as follows:

> Among the powers of such body corporate are the following:
> 1. To have perpetual succession.

And by section 1158, as follows:

> Corporations for the construction of any work of internal improvement may be formed to endure fifty years; those formed for other purposes cannot exceed twenty years in duration; but in either case they may be renewed from time to time for periods not greater, respectively than was at first permissible, provided three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and provided also that those thus wishing a renewal will purchase the stock of those opposed to the renewal at its fair current value.

These provisions which are still in force must be read into the articles of incorporation. This was expressly decided by the Circuit Court of Appeals for the Eighth Circuit in

> *Sioux City Terminal R. & W. Co. vs. Trust Co.*, 82 Fed., 124,

and is also announced by the Supreme Court of Iowa in

> *Thompson vs. Lambert*, 44 Iowa, 239.
> *Govin vs. Chicago*, 132 Fed., 848.

which is reported in this court as *Blair vs. Chicago, supra,* is readily distinguishable, and did not overrule the Detroit case in 184 U. S., or the other cases to which we have referred.

V.

The established canons of construction.

There are certain established canons of construction to which resort must always be had.

(*a*) *The rules of construction applicable to statutes are likewise applicable to legislative enactments of cities.*

This proposition will hardly be controverted. The cases are entirely analogous, so that the considerations leading to the adoption of a rule of construction in the one case must be equally applicable in the other.

In re Yick Yo, 68 Cal., 294,

involved the construction of orders of the municipal council regulating laundries. In construing conflicting municipal enactments the court says:

> The rules for the construction of ordinances and orders of a municipal corporation are the same as for the statutes of the legislature.

In

Zorger vs. City of Greensburgh, 60 Ind., 1, 5,

the question was the construction of a penal city ordinance. Upon the question of construction the court says:

> The second section of the city ordinance, set out in the appellee's complaint in this case, must be construed in our opinion, in accordance with the rules which govern the construction of other legislation. In the case of *Lovejoy vs. Robinson*, 8 Ind., 399, it was said by this court that "In construing a statute, effect is to be given to every part, and we are not to suppose words had been used which were intended to import nothing." In the case of *Stayton vs. Hulings*, 7 Ind., 144, it was said, "Statutes should be so construed as to give a reasonable effect to every part, if capable of such construction." In 1 *Kent Com.*,

461, the law on this subject is thus stated: "It is an established rule in the exposition of statutes, that the intention of the law giver is to be deducted from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms."

It seems clear to us that these rules for the construction of statutes are properly applicable to the construction of city laws and ordinances, and of the section of the ordinance of the city of Greensburgh on which this section was founded.

In

Martin vs. City of Oskaloosa, 126 Iowa, 680,

this doctrine is approved by the Supreme Court of Iowa. The question was whether a certain ordinance was intended to be retrospective. We make the following excerpt from the opinion, the italics being ours:

> There is not a word in the amendment ordinance from which it can be gathered that the same was intended to have any retroactive effect. On the contrary, the provisions thereof—and we need not set them forth—indicate that the ordinance was to have prospective effect only. *A statute—and, by parity and reasoning, an ordinance—will not be given effect retrospectively unless the intent is clear.*

Inasmuch as this is an Iowa transaction we assume that the case last cited is controlling. We call attention, however, to the following cases which recognize this doctrine:

Denning vs. Yount, 9 Kans. App., 708.
Id., 62 Kans., 217.
Ashland Water Co. vs. Ashland County, 87 Wis., 209.
People vs. Mayor, etc., of Brooklyn, 14 A. D., 556.
State vs. Kirkley, 29 Md., 85, 103.
Doane vs. City of Omaha, 58 Neb., 815.
People vs. Harrison, 185 Ill., 307.

(*b*) *The history of an act may be resorted to in aid of its interpretation.*

The court will look to the history of the times in which the law was passed to aid in its interpretation.

Aldridge vs. Williams, 3 How., 23.
United States vs. Union Pac. R. Co., 91 U. S., 79.
S. W. Mo. Lighting Co. vs. Scheurich, 174 Mo., 235.

From the opinion in the case last cited we take the following:

> A learned text-writer laying down the rule that contemporary history is to be consulted in construing a statute, quotes from the Supreme Court of the United States in *U. S. vs. Union P. Ry. Co.*, 91 U. S., 72: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provision in it" (*Black on Interp.*, L., p. 212).

(*c*) *Contemporary construction is entitled to great weight.*

In

Hahn vs. U. S., 107 U. S., 402, 406,

the court says:

> The court added that such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation, sanctioned by this court in the *United States vs. Pugh*, 99 U. S., 265, that, "in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *Edwards, Lessees vs. Darby*, 12 Wheat. 210," and where this court refused to inter-

fere with such construction after it had been acted upon for a long time.

In re Washington St. A. & P. R. Co., 115 N. Y., 442,

presented the question whether the general railroad incorporation law should be construed to authorize the organization of street railroads under it. The court said:

> Both corporations were organized under the general railroad act of 1850 and its amendments. It is claimed that such act does not relate to the incorporation of street railroads. This claim is at war with the generally received construction of the act. Ever since its passage in 1850, or at least within a very few years thereafter, corporations for transporting passengers by horses as a motive power, over railroads in the streets of cities, have been formed under and by virtue of the provisions of such an act, and no doubt has thus far been suggested as to the validity of such corporations.

It further says in the same opinion:

> For more than twenty-five years corporations of that nature have been formed under it, and no State officer whose duty it would have been to refuse to file such articles of association if the act did not provide for their organization has ever thus refused; but, on the contrary, there would seem to have been an uniform recognition of the right to file such articles, and of the legality of this kind of corporation thus formed. Such acquiescence and recognition on the part of the officers of the Government, are of very considerable, if not of controlling, weight in the interpretation of a general act of the legislature relating to public objects like the one under discussion. *Easton vs. Pickersgill*, 55 N. Y., 310; *People vs. Dayton, Id.*, 367. The consequences of a different construction at this late day, and after an acquiescence of so long a time, would, or might be, disastrous in the highest degree to other interests existing and founded upon the legality of an incorporation for horse-railroad purposes under the act of 1850; and this court would be reluc-

tant to give such a construction to the act, unless called upon by the plainest language of the legislature—so plain, indeed, that there could be no rational argument advanced in favor of the other view. No such case is made out here. We conclude that the first ground for denying the prayer of the petition is untenable.

(*d*) *The practical construction given to an enactment by those whose duty it is to enforce it, is entitled to great weight, and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.*

Sutherland Stat. Constr. (2d ed.) Sec. 474.

Westbrook vs. Miller, 56 Mich., 148,

involved the validity of a tax deed signed by a deputy auditor. Judge Cooley, writing the opinion, said:

> When, in the performance of executive duties, it becomes necessary for the Executive Department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of considerable time before its acts are called in question. This has been several times held by the Federal Supreme Court, and by the subordinate courts of the Federal system, and a reference to a few of the cases will be sufficient to show the current of decision. *McKeen vs. Delancy*, 5 Cr., 22; *Surgell vs. Lapice*, 8 How., 48, 71; *Bissell vs. Penrose*, 8 How., 317; *Union Insurance Co. vs. Hoge*, 21 How., 35, 66; *United States vs. Gilmore*, 8 Wall., 330; *United States vs. Pugh*, 99 U. S., 265, 269; *United States vs. Lytle*, 5 McL., 9; *Hahn vs. United States*, 14 Ct. Cl., 305; *Swift vs. United States*, 14 Ct. Cl., 481. It was also held by this court in the case of Malony *vs.* Mahar, 1 Mich., 26, where the question was whether a deputy county treasurer had authority to administer a certain oath in the place of his principal, and also in the subsequent case of Britton *vs.* Ferry, 14 Mich., 53. The case of Continental Improvement Co. *vs.* Phelps,

47 Mich., 299, 303, rests in part on the same principle. The cases in other States which hold the same doctrine are too numerous for citation, but as they all rest upon the inconvenience that would arise from unsettling what in good faith has been done in the necessary discharge of public duty, many citations would only serve to show the frequency in which the occasions for the application of the principle arose. As we have recognized and acted upon the principle heretofore, we may well leave this case to rest upon our previous decisions.

A case of especial interest, in that it applies this doctrine to the construction of a grant of rights in the highway, is *Turnpike Co. vs. Commonwealth*, 96 Ky., 225.

The mooted question was, whether under its charter the company had the right to establish toll gates at such intervals as it pleased, or only at intervals of five miles. The former construction had long been acquiesced in. The court says:

> If we are called on to construe these acts without regard to the construction adopted by all concerned some thirty-odd years ago, we might readily agree with the appellees. What we conclude is that the construction contended for by the appellant is not an inadmissible one, and in view of the contemporaneous interpretation of the meaning of the acts, and the long and continued usage under the law by those claiming a right under it, we think their construction the proper one. Mr. Pomeroy says: "The practical construction given to the statute by the public officers of the State, and acted upon by the people thereof, is to be considered, and is perhaps decisive in cases of doubt." Note to Sedg. St. & Const. Law, p. 227. In U. S. *vs.* Pugh, 99 U. S., it is said: "It is a familiar rule of interpretation that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. In Barbour *vs.* City of Louisville, 83 Ky., 95, this rule is fully

> recognized, and the meaning of language hardly to be deemed ambiguous was controlled by the construction put on it by those who procured the law under consideration, and who were charged with its execution. In Collins *vs.* Henderson, 11 Bush., 74, considerable stress was laid upon the light in which a law was received and held by the contemporary members of the profession. It is not necessary to notice minor errors in the judgment complained of. For the reason indicated, the judgment is reversed, for proceedings consistent with this opinion.

The same doctrine was applied as to matters of taxation in

> *Bloxham, Comptroller, vs. Street R. R. Co.*, 36 Fla., 519,

Westbrook vs. Miller, supra, being cited with approval and followed.

This court applied the same doctrine in

> *United States vs. Union Pac. R. Co.*, 148 U. S., 562,

where the question was as to the interpretation of a land grant; the contention of the railroad company was sustained, the court saying:

> If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the land department for eighteen years, under which construction those lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight.

Again, in

> *Bank vs. Parker*, 192 U. S., 73,

this court sustained a claimed exemption from taxation upon this theory, the opinion stating:

> This view is sustained by the contemporaneous construction of the bank's charter. It was not only the immediate sense of the officers of the State, but their continued sense through a number of years, that the

bank was exempt from all taxation, and when the right of taxation was asserted a license tax was not included.

To the same effect see

People vs. Fidelity & Casualty Co., 153 Ill., 25.

(*e*) *Acts of the Parties.*

It is settled that the familiar doctrine that the acts of the parties may be resorted to in aid of the construction of a contract, applies to contracts with municipal corporations.

An early case in this court is

Chicago vs. Sheldon, 9 Wall., 54,

involving the construction of a street railroad ordinance under which the street railroad claimed an exemption from certain obligations as to paving. We take the following from the opinion:

> What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d of May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves, is entitled to great, if not controlling influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of law. But, in an executory contract, and where its execution necessarily involves a practical construction,

> if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.
>
> There is another consideration in the case entitled to weight in the interpretation of this contract; and that is the language of the contract made between the city and the company in 1864. This ordinance is in *pari materia* with one of 1859, and helps to explain any ambiguity in it.

This rule is recognized in *Blair vs. Chicago*, 201 U. S., 486.

Again in

Van Hostrup vs. Madison City, 1 Wall., 291,

this doctrine is invoked. The question was whether the language in the charter of the city authorizing it to take stock in "any chartered company for making a road or roads to the said city," authorized a subscription for bonds of a road not extending to the city, but connected with one that did. The court said:

> Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. *Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of bona fide purchasers for value, we should have felt bound to acquiesce in it.*

A very strong case is

St. Louis Gas Light Co. vs. St. Louis, 46 Mo., 121.

Here there was involved the construction of a contract for lighting between the city and the company. We take the following extract from the opinion:

> Assuming that there is sufficient doubt as to the meaning of this agreement to admit of construction, I will first consider the question whether the court was

bound to construe it from its language alone, or whether the actions of the parties might be inquired into in order to ascertain the construction which they put upon it for themselves; in a word, whether in the use of words of doubtful meaning or application, the meaning and application given them by the parties who used them shall prevail over an interpretation that might be given by the court. It seems to me that the statement of the question should carry with it the proper answer. It has nothing to do with the old question of admissibility of evidence to contradict or vary a written agreement. The law upon that matter has been too long and well settled to be subject to any doubt whatever, and the position taken by the circuit court in its instruction to the jury does not involve its consideration. Nor is it the same question that so often arises when evidence is offered to explain a latent ambiguity, though it has a strong analogy to it.

Our daily experience impresses us with the imperfections of common language and shows the errors into which we constantly stumble in the use of the most important medium we possess for the communication of ideas. Such is the indefiniteness of words and phrases in daily use, and of so many meanings and shades of meanings are they susceptible, according to their arrangement, application, figurative or provincial, use, or the different ideas attached to them by different persons, or by the same persons on different occasions, that no science or special art can be taught and no mechanical occupation can be prosecuted without the precision of technical terms and phrases. And if simple words and phrases so fail to communicate ideas with accuracy and precision, so much the more may parties to a long and complicated agreement not only fail to understand it alike, as is shown by every day's dispute, but if they agree in its meaning they may give it an interpretation differing from that which a court accustomed to greater precision of language would consider the most natural. In a case of that kind, whose interpretation should prevail? If the court gives one differing from that understood by the parties, it in effect makes a new agreement—the very thing most to be avoided. If it leaves

the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement, accords with every principle of reason and justice.

It is true that evidence of such understanding should not be entertained when the language is clear and will admit of but one interpretation, because in that case, unless there is a fraud or mistake, the language used is the best possible evidence of the intention. Nor should any regard be paid to loose declarations or equivocal or isolated acts, but the continuous conduct of the parties for a series of years concerning the subject-matter of the contract, and in fulfilment of its conditions—every act pointing in the same direction—may make their understanding as clear as by the greatest precision of language.

* * * * * * *

Most of the instances where resort is had to acts, etc., in aid of construction, are found in cases where the meaning and application of words in old grants, in the location of highways, etc., are controlled by the signification attached to them for a series of years by the parties or by those interested. Thus, in *Wadley vs. Bayliss*, 5 Taunt., 782, *in relation to the enjoyment of a right of way under an old award, the court held that "the language of the award being ambiguous, it was competent to go into evidence of the enjoyment had, in order to see what was the meaning of those who worded it."* And in *Livingston vs. Ten Broeck*, 16 Johns., 15, the usage of the parties under a deed was held admissible to explain its terms.

Mobile vs. L. & Nashville R. R., 84 Ala., 115.

Note also what this case says about contemporaneous construction. We quote from the opinion at page 122. After referring to the fact that the rights claimed had been exercised without complaint or interruption for between seventeen and eighteen years, the court says:

A contemporaneous construction of a law is of very high authority. The practical exercise of a right

> under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts, the courts being always strongly inclined to interpret every agreement as the parties themselves would have done by practical usage, regarding their conduct in the every-day execution of its terms as an agreed interpretation of them.

State Ex rel. vs. Mayor, 49 Mo., 401,

was an action for a mandamus to compel the city of St. Joseph to deliver bonds under a bridge subscription. In connection with the construction of the ordinances in question the court said:

> This was the contemporaneous construction placed upon the ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have vested. Although this would not be controlling if the language was clearly the other way, yet in doubtful cases it is entitled to and should receive weight.

A case to which we call especial attention is

> *City Ry. Co. vs. Street Ry. Co.*, 38 Pac., 986, not in the official reports.

In that case a question arose under a street railroad ordinance, and the court said:

> In the present case the acts of recognition by the city council of the continued existence of plaintiff's franchise have been numerous and unequivocal. For fourteen years, of which at le[illegible] eleven years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders and ordi-

nances, and by its pleading in a judicial proceeding, recognized plaintiff's franchise as valid and in force, insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expense in paving the public streets, in paying taxes, and in other ways, which it would certainly not have incurred had the alleged forfeiture been insisted upon. As the fact that plaintiff had not constructed its railway on certain streets was necessarily one of public notoriety, it must be presumed that the city council had knowledge of it; and its acts, in view of that knowledge, conclusively import a waiver of the right to insist upon a forfeiture, and estop the city from ever claiming that a forfeiture has occurred. And the city is by law the agent of the public for this purpose, this estoppel extends to the whole public and binds the defendant and all other persons. *People vs. Holladay*, 93 Cal., 241; 29 Pac., 54. * * *

On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch to be "connected with the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on defendant's objection that it was "irrelevant, immaterial and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and waiver of the alleged forfeiture.

In

Auditor vs. Cain, 22 Ky. L. Rep., 1888,

the court held itself bound by the generally followed construction of a statute as to jurors' fees.

In

Sherman vs. Rugbee, 16 Vt., 439,

there was involved the validity of a school meeting and it was there said:

> In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable length of time.

In

Van Hostrup vs. Madison City, supra,

this court said:

> Where the true construction of the charter remains in doubt, and the construction adopted by the city authorities had been acquiesced in generally, and acted upon by third persons in good faith with their transactions with the city, it will be precluded by the courts in actions by such third parties from denying this construction to be a true one.

(*f*) *Matters in pari materia.*

It is a fundamental rule of construction that all enactments pertaining to the same subject matter must be taken together, as if enacted at the same time and as a part of a single law.

There is a presumption that the law is harmonious and the enacting body is presumed to have had in mind its earlier enactments and to have acted with reference to them. This rule applies to ordinances as well as to statutes. The reasons for its application are identical in each case.

In

Railway Co. vs. Railway Co., 38 Pac., 986,

which is not reported in the official reports, the court says:

> On the trial plaintiff offered in evidence an ordinance of the city, duly passed July 10, 1889, and numbered 110, granting to plaintiff the right to construct on Fourth street a switch to be "connected with

> the main track of the Santa Rosa Street Railroad, now laid and constructed on said Fourth street." In that ordinance it was provided that the term of the franchise thereby granted should "extend until the expiration of the term of the franchise for laying, etc., the main track of the Santa Rosa Street Railroad." This ordinance was excluded by the court on the defendant's objection that it was "irrelevant, immaterial and incompetent." From what has been said above, it follows that this ruling of the court was error. The ordinance contained an unequivocal recognition of plaintiff's franchise, and therefore tended to show both the original existence of the franchise and a waiver of the alleged forfeiture.

See also

Penn. Co. vs. Frana, 13 Ill. Ap., 91.

In

Chicago vs. Sheldon, 9 Wall., 50,

this court referred to an ordinance passed in 1864 to ascertain the meaning of an ordinance passed in 1859, and said on page 55:

> There is another consideration in the case entitled to weight in the interpretation of this contract, and that is the language of the contract made between the city and company in 1864. This ordinance is in *pari materia* with the one of 1859, and helps to explain any ambiguity in it.

In

State vs. Shaw, 28 Iowa 78,

the court says:

> It is a well settled rule that all statutes in *pari materia* for the purposes of arriving at the legislative intent are to be taken together and *examined as if they were one law, though enacted at different times and not referring to each other.* Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons and things. *United Soc. vs. Eagle Bank*, 7 Conn., 457.

The rule is recognized in

The State vs. Sherman, 46 Ia., 415-422.

There the court says:

> These afford clear indications of the will of the legislators, because it must be presumed that statutes are intended to be harmonious in all their parts, and *consistent with all other statutes upon the same subject which are not repealed*, and that the language of the law-makers was used in reference to the subjects of the statutes in a sense that would promote the remedy of relief which is the object of the enactment.

In this court this rule was announced as early as 1809 by Marshall, C. J., in

Alexander vs. Alexander, 5 Cranch, 1-7,

where the court said:

> If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, *the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act*, is a *direction* to courts in expounding the provisions of the law.

In that case the two statutes were fifteen years apart. The court in

United States vs. Freeman, 3 How., 556-564,

says:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in *pari materia are to be taken together as if they were one law*. Doug., 30; 2 T. R., 387, 586; 4 Man. & Sel., 210. If a thing contained in a subsequent statute be

within the reason of a former statute, it shall be taken to be within the meaning of that statute; Ld. Ramy., 1028; *and if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*

Atkins vs. The Disintegrating Co., 18 Wall., 272-301.
Cope vs. Cope, 137 U. S., 682-688.
Stockdale vs. The Insurance Companies, 20 Wall., 323.
Sutherland on Stat. Construction (Ed. 1904), Sec. 448.
Perkins vs. Perkins, 62 Barb., 531, 534.
In re Livingston, 121 N. Y., 104.
Commonwealth vs. Sylvester, 13 Allen, 247.
In re Hall, 38 Kan., 670.
Powell vs. Sherwood, 162 Mo., 605.
Railroad Co. vs. Zernecke, 59 Neb., 689.
Commissioners vs. Life Ins. Co., 90 Fed., 222.
Cochen vs. Meth. Prot. Church, 32 App. Div., 239.
Duncan vs. Owens, 47 Ark., 388.
Merrill vs. Gorham, 6 Cal., 41.
Ferrari vs. Board of Health, 24 Fla., 390.
People ex rel. vs. Hazlewood, 116 Ill., 319.
Hunt vs. Railway Co., 121 Ill., 638-644.
State vs. Township, 6 Ind., 83, 90.
State vs. Gerhardt, 145 Ind., 439.
Kollenberger vs. People, 9 Col., 233.
Cincinnati vs. Guckenberger, 60 Oh. St., 353.
Town vs. State, 59 Vt., 39.
Simkins vs. Ward, 45 Mich., 559.
Trust Co. vs. Iron & Coal Co., 47 Fed., 136.

In the recent case of

Chamberlain vs. Telephone Co., 119 Iowa, 619,

the Supreme Court of Iowa has again unequivocally committed itself to this doctrine.

A street railroad case illustrating the rule is

State vs. Newport Street Railway Company, 16 R. I., 533.

A question arose as to whether a street railway had the right to cross a particular street. The court says:

> The fact that the company had previously laid a track across one of the accepted streets without hindrance in order to reach a wharf upon which they were authorized to run their cars confirms the inference that such a power was not excluded by the charter.

VI.

The Rule of Strict Construction.

Counsel cite an overwhelming array of authorities in support of the proposition that grants made by municipalities will be strictly construed and that all doubts will be resolved in favor of the public. As to this general proposition there can of course be no dispute. It does not mean, however, that whenever there is a municipal grant involved, all that it is necessary for the municipality to do is to deny its validity in order to create a doubt which shall result in the destruction of the rights conferred by the grant. The doubt must be one that fairly arises and that cannot be resolved by the application of the rules of construction.

Blair vs. Chicago, supra,

well illustrates what is necessary to raise such a doubt as to render this rule applicable. As to the construction which was repudiated there, the court says:

> "But in this act the construction insisted on by the companies is inconsistent with the policy of the State" (p. 465).
>
> That "it practically reads out of the act the preceding clause of the very section under consideration" (p. 465).

That "it requires us to ignore or entirely change the sense of terms establishing the contracts as made" (p. 466).

That "it requires an interpretation which applies to the future what is specifically meant for the past" (p. 466).

That it does "violence to the rule that words are to be considered in their ordinary signification, and every part of the statute, if practicable, given meaning in harmony wth its other provisions" (p. 466).

That it does "violence to the very terms of the law" (p. 467).

And that "each construction could be maintained with at least equal force" (p. 471).

In that case the conclusion is predicated on the finding that there had been no recognition by the city of the construction which was claimed by the company. The circumstances referred to would unquestionably be enough to create a doubt.

The rule is well stated in

People ex rel. The Gas Co. vs. Deehan, 153 N. Y., 528, 532.

It is there said, in construing a grant of rights in a street:

> The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties when expressed in plain language cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results not contemplated or intended should be avoided in a grant as well as in a statute.

Again in

Trustees of Southampton vs. Jessup, 162 N. Y., 122, 127,

the court says:

> In construing this franchise we are not to lose sight of the principle that a grant from the public, so far as it is ambiguous, is to be construed in the interests of the public, and hence in favor of the grantor and not as in ordinary cases in favor of the grantee. This principle, however, is to be applied only when doubt arises, for when the meaning is clear there is no room for construction.

This court in

Citizens Bank vs. Parker, 192 U. S., 73, 85,

in very vigorous language denies that the office of this rule is to compel an immediate surrender to an ambiguity whenever it is suggested. The court says, after stating its conclusion:

> And in reaching that conclusion the rule requiring the strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised as to the meaning of a statute, ambiguity occurs which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we cannot concede such effect to the rule, nor is such effect necessary in order to make the rule useful and at times decisive. Its proper office is to help solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, effective maybe when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute. Will courts ever be exempt, or have they ever been exempt, from that duty? Has skill in the use of language ever been so universal or will it ever be so universal as to make indubitably clear the meaning of legislation? Has forecast of events ever

> been so sure, or will it ever be so sure, as to make inevitably certain all the objects contemplated by a statute? We think not, and there never will be a time in which judicial interpretation of laws will not be invoked, and it cannot be omitted because a doubt may be asserted concerning the meaning of the legislators. We repeat, it is the judicial duty to ascertain if doubt exists.

Counsel for the appellant have utterly misapprehended the force and office of this rule. They do not attempt to point out a single ambiguity in connection with the ordinance in question. They say that the ordinance is clear and unambiguous and that the rights granted under it are limited to thirty years. They do not suggest a doubt as to its construction. Their interpretation of the rule is directly in the face of what has just been quoted from this court. Their interpretation of it is that whenever a controversy is or can be raised the ambiguity arises.

The city has for forty years concurred in the interpretation of this ordinance as a permanent grant. After this lapse of time, the city may raise a controversy, but it cannot create an ambiguity as to what has so long been settled.

After all is said, in its final analysis, the argument of counsel is not that any real ambiguity exists, but that now, after the rights of the parties have been fixed for forty years, the city should be permitted to repudiate all that it has done since 1866, in order to enable it to destroy this grant by engrafting on it a constructive limitation, directly opposed to the real intention of the parties.

VII.

The city is estopped from assailing the Turner ordinance.

Counsel admit in their brief that when the consolidation of 1889 was made, it was contemplated by both the city and the company that the consolidated property should be operated under the Turner ordinance, and not only concede, but contend that thereafter and down to the present time

the property had been operated under that ordinance. The evidence shows without dispute that upon this basis and in reliance upon this ordinance, the Broad Gauge and Sevastopol properties were acquired; the Turner ordinance was amended; the suit assailing its validity was compromised; the entire property was rehabilitated; that after the 1st of January, 1898, the mileage was more than doubled and almost three-quarters of the old mileage was rebuilt; that large additions to the power house and equipment were made; that the latest trust deed, which is a matter of public record, and under which $2,195,000 of bonds have been issued, was not executed until April 1, 1901; in fact, that substantially every dollar of the present investment has been invested by the company since the 1st of January, 1898, in reliance upon its right to operate under this ordinance and with the knowledge and acquiescence of the city and without protest or objection from any one.

It further affirmatively appears that during this period from time to time the city council has passed resolutions authorizing or requiring additional investments, predicating these resolutions upon the existence of this Turner ordinance. These matters are fully set up in the bill of complaint. The answer does not deny that the money was invested; it admits that the city knew the company claimed these rights; and there is no averment of any protest or objection by it. Under these circumstances we say that under the authorities the city is beyond question estopped from now asserting that this ordinance did not authorize what was done under it, with such knowledge by the city.

In this connection it should be borne in mind that the powers of the city which are involved here are its proprietary or business powers, as distinguished from its governmental or public functions, and that in the exercise of these powers it is bound by the same rules that apply to private persons.

Illinois Trust & Savings Bank vs. City of Arkansas City, 76 Fed., 271.

Omaha Water Co. vs. City of Omaha, 147 Fed., 1.

Bailey vs. Mayor, etc., 3 Hill (N. Y.), 538.

State ex rel. vs. Barker, 116 Iowa, 96, 103.

In the case just cited the Iowa court says:

> The dual capacity of such a corporation has long been recognized; in other words, it is in part a public agency of the State and in part possessed of local franchises and rights which pertain to it as a legal entity for its corporate advantage. The right of a municipal corporation to hold and manage property, to sue and be sued, and to act generally as a private corporation in supplying local needs and conveniences has been distinctly recognized by a long line of well considered cases.

The Supreme Court of Iowa cites many authorities in support of this statement, including

> *Illinois Trust & Savings Bank vs. City of Arkansas City*, 76 Federal, 271.

decided by the Circuit Court of Appeals for the Eighth Circuit, and was approved by this court in the *Walla Walla* case. With reference to the exercise by a city of its business or proprietary powers, the court there says:

> But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation.

In that case it was objected that a water ordinance had never been passed, but was defeated by a vote of the council. Commencing at page 293, the court says:

> There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract which its records and its conduct have constantly made, and in reliance upon which the gas

> company and the water company constructed and extended the water works, and the bank and the bondholders loaned their money.

In support of this proposition Judge Sanborn quotes from the opinion of this court in

Zabriskie vs. R. R. Co., 23 How., 381, 400, 401,

saying:

> The Supreme Court held that a corporation was estopped to question the validity of its void guaranty because it had permitted the circulation of bonds that carried it:
>
> "A corporation quite as much as an individual is held to a careful adherence to truth in all their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claim of their own conduct as superinduced. * * *
>
> "In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations."

The argument of counsel in resistance to this contention is predicated upon the assumption that in order to grant a street railroad right after 1897, a vote of the people was necessary, under the provisions of sections 775 and 776 of the Code of 1897 of Iowa. Section 775 empowers cities and towns to authorize and regulate street railway and other electric wires and poles and support thereof. Section 776 provides that no franchise shall be granted for the use of streets for the purposes named in section 775 unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The appellee operates its cars by means of electricity supplied from overhead wires.

Section 767 of the Code grants to cities power to authorize or forbid the construction of railway and street railway tracks. As to this, no vote is necessary. Consequently, as the law now stands in Iowa the city has the power, without the concurrence of a vote of the people, to grant the right to maintain and operate tracks. A right to maintain poles and wires must be confirmed by a vote of the people. Therefore the argument of counsel upon this proposition must be limited to the right to maintain poles and wires and cannot be directed against the right of the company to maintain its tracks.

By the ordinance in question the company is not limited to electricity as a motive power. Its provision is that the cars "shall be operated by animal power or by electricity or other practical motor power" (section 2, ordinance March 8, 1890; Tr., p. 10). The resolution that is in controversy (Tr., p. 15) directs the removal of all of the tracks as well as of the poles and wires. If the company had not the right to maintain the poles and wires there would remain the right to maintain its tracks and to operate by horses, compressed air, cable, underground trolley, or by the use of gasoline or other power, not involving the use of poles and wires.

We submit that the contention of counsel is not sound and that the authorities to which we are about to call attention demonstrate that this estoppel is good not only as against the city, but as against the State and as against abutting property owners; in other words, as against all interested persons who stood by and permitted this investment upon the faith of this ordinance without protest or objection. The authorities which counsel cite are to the effect that where concurrent action is necessary on the part of two or more bodies an estoppel predicated upon the affirmative act of one is not enough. None of them holds that an estoppel arising out of the silence and acquiescence of all interested parties is not good.

The first case to which we wish to call attention is

Atty. Genl. ex rel vs. R. R. Co., 24 N. J. Eq., 50.

This case sustained an estoppel growing out of acquiescence as against the State itself. The railroad had built a bridge, and during its construction, while the money was being spent, no question was made as to its authority. The court says:

> If acquiescence cannot be imputed to the complainants they certainly are chargeable with delay, which, though it may not amount to proof of acquiescence, may be sufficient to disentitle the complainants to the summary interference of the court by interlocutory injunction; and this principle applies with peculiar force where the act complained of is caused by a public company in the execution and construction of their works.

An estoppel against the public was recognized in

State ex rel. West vs. Des Moines, 96 Iowa, 521.

There the Supreme Court of the State decided that the statute under which the city of Des Moines is organized is unconstitutional, but held that the State and every citizen of the city were estopped, by their acquiescence for a period of only four years, from thereafter questioning the power of the legislature to make this enactment.

The same doctrine is asserted in

State vs. Town of Westport, 22 S. W., 888.
State of Arkansas vs. Leatherman, 38 Ark., 81.
Cooley on Const. Lim., 4th ed., p. 32.

In the case at bar the testimony shows that in each instance where the company was about to construct track upon streets already paved, it asked the city to assess, under a statute of the State, the value of the pavement which it proposed to take. That in each instance after the 1st of January, 1898, the city, instead of questioning the author

ity of the company to make these extensions, proceeded with the assessment, and that in each instance the money paid by the company was distributed among the owners of the abutting property. After January 1, 1898, 26,923.3 feet of the present track were so constructed (Tr., pp. 553, 554, and 584). The citizens who owned the abutting property accepted without protest or objection the payment of this money which counsel concede was expended by the company in the exercise of the rights which it claimed under the Turner ordinance.

In

Att'y Gen'l vs. Superior & St. Croix R. Co., 93 Wis., 604,

it was contended that the charter of the railroad company had been forfeited. The opinion says at page 613:

> The State might waive the grounds of forfeiture alleged (Beach, Priv. Corp., par. 59 and cases cited). And we are of the opinion that it did waive them by the enactment of ch. 244, Laws of 1895, amending its charter and recognizing in the most explicit manner the continued existence of the corporation, and among other things expressly permitting its right to exercise the power of eminent domain in the manner prescribed by the general railroad law in addition to the method pointed out by its original charter.

In the case at bar the city when it revised the city ordinances in 1900 re-enacted this Turner ordinance as an ordinance then in force (Tr., pp. 390, 402). In

C. R. I. & P. R. Co. vs. City of Joliet, 79 Ill., 25, 37,

the court considered the effect of estoppel in support of a right to occupy public grounds with railroad tracks. The court says:

> The validity of these grants and the rights of the railroad company under them have, as we regard the evidence, been recognized by the express action of the city of Joliet for a period of over twenty years.

> The evidence shows that the company in 1852 preferred another and more direct line. The person who had the general charge of the building of the road and who was a director and vice-president of the company testifies that at a public meeting of the citizens of Joliet in the courthouse (he thinks) he made a speech and remonstrated against running the railroad through the courthouse square; pointed out the annoyance and inconvenience that would arise therefrom; but the popular demand for the track and depot where they now are, overbore all opposition, and as the agent of the company he yielded to the demand of the citizens, much against his own judgment * * * This is referred to, not to show that any right which was given by such an assemblage of citizens or by "the popular demand," but as a circumstance to be considered among others as bearing upon the question of an equitable estoppel.

Here is a direct recognition of an estoppel against the public, not predicated upon a formal act like a vote of either electors or of a city council.

The opinion refers to a grant of privileges from the city which could not have been made available without continuing the operation of the trains over these public grounds, just as the evidence here shows changes in the tracks for the benefit of the entire system, as well as extensions and additions in outlying districts that could only be made available by the use of the remainder of the system and which were made at the request of the city. In this connection the Joliet case says:

> Here was not only recognition on the part of the common council that the company had a valid grant of the right of way over these grounds and confirmation thereof, but there was express grant by ordinance of aid and convenience in order to the future permanent and more full enjoyment of the right of way which had been granted to the company over this public ground.

Reference in that case is made to the fact that the railroad company was asked by the county authorities, with the knowledge and encouragement of the city, to pay a portion of the expense of fencing the public square.

The evidence in this case shows that the city not only "encouraged," but required this company to pave the space between the rails of its tracks whenever a street was ordered paved, down to *a date subsequent to the filing of the answer in this suit.* In the Joliet case it is said with reference to a levy of taxes:

> The levying of local taxes under the ordinance of the city was in effect a declaration upon the part of the city that the county was the owner of this property; an admission that it had the dominion over it and the right of directing its use, and consequently a virtual assent to and confirmation of the grant of the right of way over the same which it had made to the railroad company.

By a parity of reasoning, the $35,000 which the city has exacted fr[illegible] the appellee since the first of January, 1898, on account of this paving and which has to that amount benefited the owners of abutting property by a reduction of the amount assessable against them, is a recognition not only by the city, but by the property owners of the right to maintain and operate this street railway. Indirectly, this reaches to every inhabitant of the city, because every inhabitant of the city is interested in the pavement and maintenance of the streets.

The conclusion of the court in the Joliet case is in this language:

> From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company and in acquiescence in its exercise, there must be held to be an estoppel *in pais* against the city—if that principle be applicable at all to municipal corporations as respects public rights.

The court there sustained the estoppel, and we submit that every consideration which could be urged in favor of it there is found in the record here, not only once, but iterated and reiterated.

The same doctrine is applied in

City of Atlanta vs. The Gate City Gaslight Co., 71 Ga., 106.

The question in this case was whether a charter granted to the gaslight company authorized it to maintain a gas plant in the city. Upon the question of estoppel the court at page 125 says:

> But apart from all these considerations the city of Atlanta has stood by and seen this company make an outlay of $140,000 under the exercise of their rights under this charter without intimating to them that objection would be made to their use of the streets for the purpose authorized, and without the use of which their enterprise would not have been undertaken and could not have been prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin. Upon every principle of equity this failure to notify the complainant of their intention until such expenditure had been made, would estop them. Such conduct is fraudulent in the eye of the law, and where practiced upon an innocent party who is seeking *bona fide* to carry out the provisions of its charter by availing itself of the powers and privileges thereby granted, would, if anything could, debar them from now being heard.

Penna. R. R. Co. vs. Montgomery County Passenger Ry. Co., 167 Pa., 62.

is another case which holds that the estoppel is good as against individuals as well as the municipality. In this case the consent of the township supervisors had not been properly granted and the road was constructed without the

consent which the law requires. With reference to this matter the court says at page 72:

> But we know as a matter of current history that street railways have been projected and actually constructed and are now in operation over the country roads where no legal consent has been obtained and where no attention has been paid to the rights of property owners. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of land owners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money has been permitted it would be inequitable to correct at this time what was a mutual mistake, under the influence of which these enterprises have been pushed to completion.

In the case at bar for almost forty years both the city and the company concurred in the construction of this contract. In reliance upon this construction the company, with the knowledge and acquiescence of the city and its citizens, invested three or four millions of dollars. Can a property owner who has stood by without objection, who has profited by this investment, who has utilized these cars, who has availed himself of these facilities, be heard to say now that this ordinance was granted without authority or that this construction of it is wrong?

In

State ex rel. vs. Janesville Co., 92 Wis., 496,

the court held such an estoppel good against the State. Referring to an estoppel arising out of the fact that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit its franchise were notorious, the court says:

> Principles here maintained should be quite rigidly applied, where, as in this case, the corporation has not

> merely been allowed, but has been compelled by those chiefly interested and the real moving parties to proceed at great expense under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known.

The same doctrine is announced in

> *Spokane Street Ry. Co. vs. Spokane Falls*, 6 Wash., 521, 524.

We quote the single sentence:

> A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority.

If further authority is necessary upon this question the following extract from the

> *Street Railway Cases*, 73 Iowa, p. 522,

should conclusively settle it. There it was contended that the original ordinance was void and that there were defects in its re-enactment, and it was thus sought to sustain the proposition that it never became a valid ordinance. The court says:

> For the purposes of the opinion it may be conceded that what purports to be an ordinance did not take effect as such, but it appears to us that it has the force at least of a resolution so far as the provision in question is concerned. Plaintiff's assignor acted upon it and expended money, not only in laying additional track, but in paying for street paving. We feel justified in saying that every one interested thought the ordinance of 1865 was ratified and binding upon the city and the plaintiff's assignor, and that what was done afterward was done with that understanding.

Certainly during the eighteen years that elapsed after this opinion was filed and before the present controversy

arose, every one understood that this ordinance was in force and binding upon both the city and the appellee, and pursuant to this understanding the city made its requirements and the company complied with them. Pursuant to this understanding, it spent its money with the acquiescense of the city and every one else. Under these circumstances we submit that both the city and its citizens are estopped from asserting that the ordinance is void or that the rights under it have expired.

In the case of

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234,

which is cited by the appellant, the facts were radically different. There the ordinance was for the expressed term of twenty-five years. The statute affirmatively limited the power of the city to twenty-five years. There was no question as to the validity or construction of this ordinance. Not a dollar had been expended in reliance upon any claimed right. There was no question of estoppel. The company claimed an extension by implication. The essential element of estoppel, namely, silence on the part of the city with knowledge that the company was spending money in reliance upon something, is absolutely lacking. The Cedar Rapids case is like that of a tenant, holding over after he admits his lease has expired; while the case at bar is like that of a tenant in possession, under a claim that his lease has not expired, who is permitted and required by his landlord to make large expenditures in reliance on the belief that he has rights in the property.

Counsel assert that an estoppel is not pleaded. This is a misapprehension. See paragraphs 7, 27, 30, 31, and 32 of the bill. It would be more nearly accurate to say that the answer does not deny it.

VIII.

The power of the city to make an unlimited grant is beyond question.

As we have already seen, the adjudication that this ordinance constitutes and is a valid contract between the city and the present company eliminates this question. Counsel, however, discuss it at length in their brief and we consider it in answer to what is there said, though we believe that upon the determination of the *Street Railroad Cases* by the Supreme Court of Iowa, in 1887, it ceased to be more than a mere academic question. Before referring in detail to the contentions of counsel, we take up generally the power which the statutes of Iowa confer upon cities as to this matter.

At the date of the original enactment of the Turner ordinance, December 10, 1866, the city had only the ordinary, general powers over its streets, and its power to make a permanent grant was, perhaps, debatable. By the code of 1873, however, the city was granted ample power over this subject.

Section 464 of this code provides:

> They shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places, but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down, has been ascertained and compensated in the manner provided for compensation of injuries received from the regrading of streets in section 470 of this chapter.

In

Des Moines Street Railway Co. vs. Des Moines Broad Gauge Street Railway Co., 73 Iowa, 513,

the Supreme Court of Iowa unequivocally decided that this section, in connection with the other statutes which were then in existence, authorized the enactment of this particular ordinance.

This ordinance was either valid or invalid. As against its validity, as we have already seen, the city in these cases urged that it was unreasonable because it granted a perpetual right. The identical claim which is now asserted here, that it would in effect be exclusive, was urged there. In the face of this argument the Supreme Court decided that under this section the city had the power to enact this ordinance. We submit that this is a determination of the specific question that is presented by counsel, and forecloses any argument upon the question of power. Here we have more than a decision in general terms that this section authorizes an unlimited grant: we have a decision that it authorizes this particular unlimited grant that is now in controversy.

In the case that has just been referred to the Supreme Court of Iowa uses this language:

> Having reached the conclusion that under the section of the code above cited the power had been conferred *to make the contract in question*, we have to consider whether it appears that the city council, after the code took effect, ratified the contract which it had previously (and as we will assume without power) undertaken to make.

It then proceeds to the conclusion that conceding that the subsequent enactments had the force only of resolutions, they were sufficient to ratify and confirm the grant which is contained in the Turner ordinance.

After the passage of the ordinance of March 8, 1890, amending the Turner ordinance by authorizing the use of electricity as a motive power, this amendment was legal-

ized by Chapter 11 of the Acts of the 23d General Assembly of Iowa, which became effective April 29, 1890. This Act is as follows:

> SECTION 1. All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal, electricity, steam or other power, whether now known or hereafter utilized.
>
> SECTION 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted, granting to any person or company the right to propel its cars by electricity are hereby declared legal and valid, provided that nothing in this act shall affect present or pending litigation or any vested rights.

The Turner ordinance as amended by the ordinance of March 8, 1890, was enacted prior to the time that this act of the legislature became effective, and it granted the right to propel cars by electricity, so that it is by this act expressly declared legal and valid.

> *Louisville Trust Co. vs. City of Cincinnati*, 76 Fed., 296.

sustains our contention that this legalizing act removes all question as to the sufficiency of the powers of the city.

In this connection we also call attention to

> *Baltimore Trust Co. vs. Baltimore*, 64 Fed., 153.

This involved the same ordinance which was the subject of the litigation in *Lake Roland Street Railway Co. vs. The Mayor of Baltimore*, 77 Md., 352.

In the *Baltimore Trust Company* case the court refused to follow the decision of the Supreme Court of Maryland, and held that a grant without limit as to time is permanent; that power in the city to grant or refuse is power to make an unlimited grant, and that a curative act similar to the one just referred to foreclosed all argument upon the question of power.

Moreover, it has never been the policy of the State of Iowa to limit the term for which street railroad grants may be made. Section 464 of the Code of 1873 makes no reference to a limit as to time. The grant of power contained in the first section of the legalizing act that has been just referred to is absolutely unlimited. These two sections are re-enacted as section 767 of the Code of 1897, which is as follows:

> Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places.

Section 775 as to poles and wires, provides as follows:

> Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires and the poles and other supports thereof, by general and uniform regulation and to provide the manner in which and the places where the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town, and may divide the city into districts for that purpose.

In none of the sections which relate to street railroad grants is there a time limit. That it was the affirmative intention of the legislature not to impose such a limit is made clear by the fact that as to some other public service corporations, namely, water companies, gas works and electric lighting plants, a limit of twenty-five years is expressly provided by section 720 of the Code of 1897 in the following language:

> They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-

five years and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed.

By the Code of 1851 of Iowa telegraph companies were by legislative enactment authorized to construct their lines in the streets and highways of the State, there being no limit as to time upon the grant, and this is the present law. By chapter 104 of the Acts of the Nineteenth General Assembly of the State of Iowa, effective in 1882, this law was amended so as to include telephone companies, and, in a recent case, this grant, which is without limit as to time and is a direct grant by the legislature, has been sustained by the Supreme Court of Iowa.

Chamberlain vs. Iowa Telephone Co., 118 Iowa, 619.

The legislature, in adopting the Code of 1897, which was a codification of the then existing laws, re-enacted the limitation upon the term for which grants might be made to water works, gas companies, and electric light companies and authorized cities to make telephone grants which had theretofore been based upon a direct grant from the legislature, but limited the time of these grants, but it left the power to grant railroad and street railroad rights without limit as to time.

It will be noted that in section 464 of the Code of 1873 and also in section 767 of the Code of 1897, cities and towns are granted power "to authorize or forbid the location and laying down of tracks for railways and street railways on all streets," etc. The power as to railways and street railways is granted by the same verb in the same phrase of this sentence and is identical as to both of these classes of tracks. No one will contend for a moment that this word "authorize" does not vest cities with the power to grant permanent rights to railroads. The Supreme Court of Iowa has decided that such a grant to a railroad must be

presumed to be permanent and that upon that basis the damages to an abutting property owner must be assessed.

See

Pratt vs. R. R. Co., 72 Iowa, 249.
Fowler vs. Des Moines & Kansas City Railway Co., 91 Iowa, 533, 540.

The whole matter is disposed of by the case of

O'Neil vs. Lamb, 53 Iowa, 725.

In that case the Supreme Court of Iowa says:

> Regarding section 464 of the Code in full force and effect, the city thereby was vested with full power and authority to grant the defendant the right to construct and operate the road upon complying with the provisions of the statute in relation to abutting owners. The requisite power having been created, all else was a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulations.

A case squarely in point is

City of Des Moines vs. Rock Island R. R. Co., 41 Iowa, 569.

The city had built a toll bridge. It granted to the railroad company's assignor the right to occupy it, the grant being in the following language:

> That there is hereby granted to the Des Moines, Indianola & Missouri River Railroad Co. the right to lay and maintain a track and railroad over and along said bridge across the Racoon river at Seventh street in the city of Des Moines, and to operate the same over said bridge subject to the following regulations:

Later the city, by ordinance, attempted to require tolls for the locomotives crossing the bridge, and the cited case was brought to recover such tolls. As to this grant without

limit as to time the court says with reference to the matter of power:

> That the city had power to pass the ordinance in question we entertain no doubt. We discover no express limitations upon its power to contract with reference to that subject-matter.

Suppose that the word "authorize," which confers this power upon the city were adopted by the city in the ordinance making the grant, and that the ordinance read: "Be it ordained that the Des Moines Street Railway Company, its successors and assigns, are *authorized* to lay, maintain and operate single or double tracks for street railways in the streets of the city of Des Moines," etc., would there be any question as to the construction to be put upon such a grant as this? Could it be contended that this was a grant for a limited term? Could any word more completely grant authority to construct and maintain tracks than the word "authorize?" Could anything be added to it?

Certainly it could not be successfully maintained that in such a case where, in making its grant, the city used the very word that was used by the legislature in delegating the power to the city, the city had exceeded this delegated power. By the terms of the Turner ordinance consent, permission and authority are vested in the grantee. It is authorized to maintain these tracks.

When the legislature empowered the city to authorize railroads and street railroads without imposing any limits upon this power, it left to the city to determine in its discretion the time for which the authority should be granted.

In *Blair vs. Chicago*, 201 U. S., 400, 457, the court discusses this word "authorize" and says:

> The company must be "authorized" by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To au-

thorize is to "clothe with authority." Webster's Dictionary; "To give legal power to." Century Dictionary. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. *This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the State, necessarily includes the right and fixes the time for which the streets may be used.* This doctrine was, we think, correctly stated by Judge Lurton, in delivering the opinion of the Court of Appeals in *Louisville Trust Co. vs. Cincinnati*, 76 Fed. 296, 308, "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enters into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. *This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy.*"

When it is borne in mind that at the time this authority was granted in 1873 there was nowhere in the laws of Iowa a suggestion of any limitation upon a grant to any public utility and that, as Judge Dillon says, the custom was to grant permanent rights, and that the same authority is granted as to both street railroads and railroads, whose grants are necessarily permanent, no possible room for doubt as to the extent of the power conferred by the word "authorize" remains.

An instructive opinion in this connection is that rendered by Mr. Justice Brewer in the

Kansas City Water Works Case, 65 Fed., 691.

After holding the grant there in controversy to be perpetual because its term was unlimited, he took up the question of the power of the city to make the grant. The words of the statute which conferred the power on the city were:

"May contract with or grant to any person, company or corporation the right to lay and maintain water mains under, along, upon and across the streets alleys and other public grounds of such city for the purpose of conveying water to any city in this State or any other State.

Mr. Justice Brewer says:

The grant of power in this section is general and without limitation. If this were the only section bearing on the matter, it would be beyond question that the city had the power to make a permanent contract for the use of its streets.

In

State vs. Commissioners, 61 N. J. L., 470, and
State vs. Traction Co., 62 N. J. L., 386,

both involving the same transaction, it is held that power to authorize street railroads is power to make a permanent grant.

An elaborate consideration of this question will be found in the *Detroit Street Railroad Cases*, decided by the Circuit Court of Appeals of the Sixth Circuit.

See

Detroit Citizens' Street Railway Co. vs. City of Detroit, 64 Fed., 628.

These cases were later before this court and the opinion is reported in 184 U. S. We call especial attention to pages 635 *et seq.* of the decision of the Circuit Court of Appeals. We quote the following sentence from page 642:

If this view upon the limitations of the legislative power of the State be sound, it must follow that when the State acts in the only way it can act—by conferring upon the municipality the powers necessary to the establishment of such public facilities of intra-city travel—and does this in general terms, *limitations upon the discretion of the municipality in the exercise of that power ought to be plainly apparent*

before the court will be justified in declaring their existence.

In this same opinion it is said:

> The evils to be apprehended from long grants or easements to such companies seem to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident to any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case.

Again, in this same opinion, it is said:

> The consent, when given by ordinance duly passed, constitutes a grant of a right of way on and over the streets named, and constitutes a contractual ordinance conferring an easement which is irrevocable. By such an ordinance an incorporeal hereditament is created and vested in the grantee.

This opinion indicates that in jurisdictions where street railroads are regarded as a legitimate street use as distinguished from those in which the contrary doctrine prevails, there results a difference in the effect of general authority over the streets. The doctrine of the class of cases which holds that general control over the streets is not sufficient to authorize the grant of a definite street railroad right is predicated upon the assumption that a street railroad is an additional servitude and not a legitimate street use.

In

Blair vs. Chicago, 201 U. S., 486,

the court says as to grants under a mere power of general control over the streets:

> The cases in the State courts are much divided as to the right of a municipal corporation, because of its charter power of controlling the streets, to grant the use thereof to a street railway company. Some of the cases are collected in *Detroit Citizens' Street Railway Co. vs. Detroit*, 64 Fed. Rep., 628, 637.

A large number of cases of this character has been cited by the appellant in the case at bar. These cases could not properly be invoked here even if this power had not been expressly delegated, because the Supreme Court of Iowa has unequivocally committed itself to the doctrine that a street railroad, operated by electricity transmitted by overhead poles and wires, is not an additional servitude, but is merely an improvised use of the street for street purposes, and that it is such a use as is authorized by the easement in the public to use the ground in question as a roadway.

See

> *Snyder vs. Fort Madison Street Railway Co.*, 105 Iowa, 284.

In

> *People ex rel. Woodhaven Gas Co. vs. Deehan*, 153 N. Y., 528,

under a statute authorizing the organization of corporations for the purpose of furnishing gas to cities and for the purpose of laying the conductors in the streets and highways with the consent of the municipal authorities it is stated that the grants contemplated were generally in perpetuity.

> *Seattle vs. Columbia, etc., Railroad Co.*, 6 Wash., 379,

was a case where a power of the city to make a perpetual grant of a right in the streets was involved. The city was authorized

> "to authorize or forbid the location and laying down of tracks for railway and street railways on any and all streets, alleys and public places within the city."

This is almost the identical language of the Iowa statute. It was held that this grant having been acquiesced in for a number of years, no question of power could be raised.

Without further elaborating upon this matter, we submit that the statutes of the State of Iowa granted to the city of Des Moines ample power to make a permanent grant of the street railway company.

IX.

The argument of appellant that the city was without authority to make the grant in question.

Counsel for appellant predicate their argument that the Turner ordinance as a permanent grant was beyond the power of the city of Des Moines, upon two arguments, viz: that the statute in question did not attempt to delegate this power to the city, and further that such a grant is contrary to sound public policy and therefore void.

The first argument is based upon a long line of authorities cited as sustaining the proposition that the power to make a grant without limit as to time must be expressly delegated by the legislature. It is unnecessary to review these authorities. That authority to authorize and forbid, conferred by the Iowa statute, is such a delegation of this power, is demonstrated by the authorities which we have already cited in support of this proposition. The soundness of the rules announced in these authorities is not questioned by any case which is cited by counsel for the appellant.

Their second argument is neither sustained by the authorities which they cite nor by sound reason. It is the argument for a "constructive limitation" which was denied in the Circuit Court of Appeals in the Detroit case. There is nothing in the contention that a grant in perpetuity is against public policy. Such a question cannot possibly arise in such a case as this. If the city has not power

to make the grant, then the grant is *ultra vires* and fails without reference to any question of public policy. If the city has power to make the grant, it has power because the legislature has conferred it. By granting this power the legislature has defined the policy of the State and this declaration of its policy is final so far as the courts are concerned.

This rule has been very recently recognized by the Supreme Court of Iowa in

Board of Park Commissioners vs. Diamond Ice Co., 130 Iowa, 603.

There the court says:

> It is suggested that if the act is constitutional, it is against public policy and is therefore void. A legislative act, if constitutional, declares in terms the policy of the State and is final so far as the court is concerned.

In

Kahn vs. Kahn 125 Iowa, 145, 153,

the same doctrine is thus stated:

> It is contended also that it would be against public policy to permit the defendant to derive advantage from her criminal act. But the public policy of the State is the law of that State as found in its constitution, its statutory enactments and its judicial records (*People vs. Hawkins*, 157 N. Y., 121). And when such policy, touching a particular subject, has been declared by statute, as in this case, it is limited by such statutes, and the courts have no authority to say that the legislature should have made it of wider application.

The argument of counsel that the words "to authorize or forbid" should not be given by the courts their ordinary interpretation because counsel contend this would be against

sound policy, amounts, in its final analysis, to nothing more nor less than that the courts are at liberty, when the legislative declaration of the policy of the State does not accord with their notions, to defeat it by imposing a "constructive limitation" upon the meaning of the words adopted by the legislature in declaring this policy.

It is very aptly said in

Citizens' Water Co. of Bridgeport vs. Bridgeport Hydraulic Co., 55 Conn., 1, 16:

> The plaintiff has pressed upon us the consideration that a decision of this case in behalf of the defendant is the protection of a monopoly, and that a monopoly is odious. But this argument forgets the fact that it is the judicial duty to preserve contracts inviolate rather than to destroy monopolies. Communities may endure monopolies, but they cannot endure the violation of contracts.

Applying this to the case at bar, the argument of the appellant ignores the fact that it is the duty of the courts to enforce the public policy declared by legislative enactments and not to curtail or limit what the legislature has said in order to make it conform to their own views where these do not accord with the legislative expression.

The authorities which are cited by counsel are, with a single exception, cases which have arisen out of exclusive grants or where the municipal power was simply the general authority to control and regulate the use of its streets, without an express grant of power to authorize or forbid street railways.

Notwithstanding what is said in these cases, in the *Street Railroad Cases* in the 73d Iowa, which have been so frequently referred to, the Supreme Court of Iowa sustained an exclusive grant under this ordinance for the term of thirty years, although it suggests that a permanent exclusive grant might not be valid, saying in this connection

> It may be conceded that the future growth and wants of the city cannot be foreseen. The most that

> can be said is that they may ordinarily be predicated with reasonable approximation for a limited time. And thus we are inclined to think it follows that an ordinance providing for an exclusive right in perpetuity, however necessary it might be to contract for the service involved in the exercise of the right would be unreasonable and might be declared void.

It will be remembered that in that case the very argument which we are now considering was presented as a basis for the contention that this ordinance was void. In the city's petition for a rehearing in this case, set out at page 76 of the record, the city says, quoting from page 677:

> But passing this consideration, we assume that no ordinance of this kind is valid if it is (not) in accord with the public interests and sound public policy—in other words, an ordinance in violation of public policy is unreasonable, and we urge the following considerations that enter into this question and should receive the careful consideration of the court in determining them.
>
> 1. It gives to the plaintiff company the right to perpetuity to occupy all the streets and alleys with single or double tracks of the street railway and requires that they shall be operated by animal power only. There is no limit of time upon this right. * * * In its opinion the court has evidently overlooked this fact, and the case is treated as though the grantee's rights in the streets were limited to thirty years, but the grant is contained in the first section and is as sweeping as language can make it.

In the face of this argument the court adhered to its conclusion that this ordinance was valid, and rendered the decree to which we have referred granting its injunction without limit as to time.

Counsel state in their argument that in general street railroad rights are limited as to time. This statement is neither sustained by any proof in the record nor is it in accord with the facts.

This suggests an important consideration which should not be overlooked in connection with the discussion of this matter. The question is whether this contract was valid when the contract was made. The question is what the conditions were then and not what the conditions are today. If this matter is material at all, the question is whether the practice at that time was to grant rights unlimited as to time and not whether that is the practice now. The argument for the appellant speculates as to conditions that may arise some time in the future which would render it desirable for the city to terminate this grant. It does not point out any specific public inconvenience, but contents itself with general speculations. It is not pretended that the public convenience does not now require the continuance of the exercise of this right, or that, if it were terminated, it would not necessarily make a new grant to secure a continuance of the service. Moreover, if the argument of the appellant is sound, it points out the antidote for this condition if it should ever arise, in its reference to the reserved power over corporations and corporate franchises for which provision is made in both the constitution and the statutes of the state of Iowa.

But aside from this question of reserved power, this entire proposition of counsel is based upon a misapprehension. A grant in perpetuity is, *ex necessitate*, subject to the limitation that the grant can continue only so long as the exercise of it will confer a public benefit. If transportation by street railroads should be superseded by some other, better or more convenient method, so manifestly better as to destroy the value of street railroads as a public utility, they would become nuisances and the right to maintain and operate them would cease. As Judge Sanborn said in the *Omaha Bridge Cases*, 51 Fed., 319, if a contract is beneficial to the public interests, its length is but an added argument in its favor.

A case especially pertinent here is

Capdevielle vs. New Orleans & S. F. R. Co., 110 La., 904.

The city of New Orleans had granted a perpetual but not exclusive right in certain streets. The court says:

> As related to this perpetual grant urged by plaintiff, we can only say further that it can only be perpetual to the extent that the defendant company will comply with its obligations which will be onerous enough without seeking to exercise right of ownership, an interference to which it will not be entitled.
>
> It cannot be permitted to misuse a grant or to run its roads without regard to the public.
>
> There is no reason to infer that it will be permitted to run, like the brook, forever, without the least regard to conditions.
>
> Stipulations and conditions cannot be disregarded by either party and this, it seems to us, will obtain desired protection at all times and divest "perpetuity" of the odium it gives rise to when the right is uncontrolled and uncontrollable by any one save the grantee of the use.

There is but one case cited by counsel which is sufficiently analogous in its facts to afford any support to their contention. It is

> *Lake Roland Elevated Railway Co. vs. City of Baltimore*, 77 Md., 352.

The identical question which was involved in that case was presented in

> *Baltimore Trust & Guaranty Co. vs. The Mayor of the City of Baltimore*, 64 Fed., 153.

After the case between the city and the street railway company had been decided adversely to the company, the trustee for the bondholders brought this action in the United States Circuit Court.

In this case the court says:

> I think that municipal corporations invested with full power to control and regulate the use of their streets, do not exceed their powers in making irrepealable contracts not exclusive in character for the use

> of said streets for purposes relating to the public comfort and convenience; and also that a legislative grant, made either directly by the legislature or indirectly through a municipal corporation duly authorized so to act, constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend or repeal is expressly reserved in the grant itself or existed in constitutional or legislative provisions at the time of its passage. Were this not so, there would be but little security for investments made on the faith of such grants and no inducement to those controlling capital to make improvements absolutely necessary for the health and happiness of the people and for the progress and prosperity of the country. Justice requires that such legislative enactments, when the grantees thereof have accepted the same and acted thereunder, should become absolute and irrevocable contracts which neither party thereto will be permitted to revoke nor allowed to disregard or add conditions thereunto more onerous than those first imposed.

The conclusion of the federal court with reference to this matter is sustained, not only by many of the cases which we have cited in support of the proposition that a grant without a limit as to time is permanent, but by numerous other authorities as well.

Before taking up these authorities we desire to call attention to an inherent vice in counsel's argument. They contend that a grant without limit as to time is not permanent. They omit to suggest how the duration of such a grant is to be determined. Each of these grants is a contract by which the grantee acquires the right to occupy the streets. As to these grants it is said by the Court of Appeals of New York in

> *People ex rel. Gas Co. vs. Dechan*, 153 N. Y., 528, 533:
>
> Such a grant is generally in perpetuity or during the existence of the corporation or at least for a long

> period of time and should be given effect according to its nature, purpose, and duration.

The exercise of these grants involves the permanent investment of large sums of money. If a grant without limit as to time is not in fact without limit as to time, there is no means for ascertaining how long the right will continue. The grant amounts to nothing more than a license revocable at the pleasure of the municipality. The argument of counsel, therefore, involves the contention that these grants contemplate that such investments will be made with absolutely no assurance of the stability or continuance of the right which is at their very foundation. As is said in the *Baltimore* case, under these circumstances capital would absolutely refuse such investments, and the public would be required either to do without these utilities or to resort to municipal ownership.

The conclusion of the Maryland court stands alone, unsupported by any authority.

The Supreme Court of Washington, in

> *Seattle vs. Railroad Co.*, 6 Wash., 379,

says upon this question, at page 392:

> Property rights acquired under and by virtue of franchises thus granted are perpetual unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound to the end that property right may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for, should it become necessary to thereafter undo the work and terminate the rights granted and to take the property of the corporation acquired in pursuance and by virtue thereof, it may be so under the exercise of the power of eminent domain

and upon making compensation; and this is a sufficient protection for the rights of the city and one which at the same time affords protection to the rights of the respondents.

The Court of Appeals in the State of New York, in

Trustees of Southampton vs. Jessup, 162 N. Y., 122,

instead of saying that *prima facie* a permanent right is against public policy, says:

> A franchise is a grant by or under the authority of government conferring a special *and usually a permanent right* to do an act or a series of acts of public concern and, when accepted, it becomes a contract and is irrevocable unless the right to revoke is expressly reserved (*People ex rel. vs. Utica Insurance Co.*, 15 Johns, 358, 387; *Bank of Augusta vs. Earle*, 13 Peters, 519, 595; *California vs. Pacific R. R. Co.*, 127 U. S., 1, 40).

It says further as to the privilege there in controversy:

> It is a special privilege because it is not of common right; is permanent because there is no limitation as to time, and is of public concern because it relates to the public domain.

In New Jersey in

Phillipsburg Electric Co. vs. Phillipsburg, 66 N. J. Law, 506,

permanent rights are sustained, the court saying:

> We think this question is settled by the cases of *Hudson Telephone Co. vs. Jersey City*, 49 N. J. L., 303, and *Suburban Electric Light and Power Co. vs. East Orange*, 41 Atl. Rep., 865, which hold that permission granted by a common council under like circumstances to this was, after acceptance and expenditure of money under it, irrevocable.

Perpetual grants were sustained in

Suburban Electric Co. vs. Inhabitants of East Orange, 41 Atl., 865, affirmed in 44 Atl., 628, and not officially reported.

It will be observed that this case is approved in the Phillipsburg case, *supra*.

In

County of Floyd vs. Rome Street R. R. Co., 77 Ga., 614,

a bridge occupied by street railroad tracks was destroyed. When the bridge was restored, the street railroad's attempt to reoccupy it was resisted by the city. The court says:

> Where the statute authorizes the laying of rails on a highway with the assent of the municipal body, such assent, when given, is irrevocable.

In

Nash vs. Lowry, 37 Minn., 261,

the Supreme Court of that State sustained an irrevocable grant where the city was without authority when the ordinance was first enacted, but the ordinance was later ratified by the legislature.

The case of the

Citizens' Water Co. vs. Bridgeport Hydraulic Co., 55 Conn., 12,

already referred to upon another matter, sustains a grant which was to continue so long as the company furnished adequate service to the public. It was in this case that the court said that communities might endure monopolies, but could not endure the violation of contracts.

In

Belleville vs. Citizens' Horse Railway Co., 152 Ill., 171,

it is held that a right to occupy a street, when acted upon, becomes a valid and irrevocable contract.

In

Denver St. Railway Co. vs. Denver City Railway Co.,
2 Col., 673,

an exclusive and apparently perpetual right to operate a horse railway on the streets made by a direct legislative grant, was upheld.

Upon this proposition the authorities are all one way. Aside from the decision of the Supreme Court of Maryland in the *Lake Roland Elevated Street Railway* case, there is not a reported decision of a court of last resort which attempts to overthrow a permanent non-exclusive grant on the ground that it is against public policy. On the contrary, the validity of such grants is recognized in a very large number of cases.

As a matter of fact, permanent grants are not against such sound public policy. Such grants are *ex necessitate* subject to limitations. The public possesses broad regulatory powers. The right to regulate rates is absolutely established. The police powers are broad and comprehensive. The right cannot continue after its exercise ceases to be a public benefit. As a practical proposition it is impossible to imagine circumstances under which a public utility would insist upon the exercise of its rights after it had ceased to serve the public. It would be in a position where it could derive no income from the exercise of these rights or no substantial income. The investment would immediately become unprofitable. Ordinary business necessities would require either a new grant modifying the old one to make it conform to the existing conditions or else an abandonment of the old one. If street railroads become no longer practicable as methods for urban transportation, people will not patronize them and the cars will not be operated because, to operate them would render the companies insolvent.

On the other hand, a permanent and stable right is an absolute essential to efficient and economical service. If

the investment is at the hazard of every caprice of a city council, this hazard is an element that must be taken into account in fixing the charges for the service. If extensions are to be made, if the plant is to keep up with the requirements of the public, there must be some assurance that it will be permitted to do business over the new lines that are built and with the new equipment that is furnished; otherwise, such investments will not be made. Sound public policy does not require limited street railroad grants; it does require permanent grants. The interests of the public are fully protected by the power which the State has to regulate and by its police powers as well as by what inheres in the business situation.

The statement quoted by counsel from

> *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234,

is purely dictum. This statement was made in a case where the franchise was limited to twenty-five years and where the statute with reference to water works prohibited the granting of a franchise for a longer term and also prohibited the granting of an exclusive franchise. If this statement be taken as a general statement it is clearly one without support in the authorities and directly against the overwhelming weight of them. If it is limited to the facts of that particular case and to the facts set out in the numerous cases cited in the opinion to sustain it, which were all of them exclusive grants, we have no quarrel with its soundness, but it is wholly immaterial.

X.

The other ordinances.

Counsel in Division V. of their brief, page 122, enumerate a large number of ordinances other than the Turner ordinance which grant rights in the city of Des Moines and

which are now held by the Des Moines City Railway Company. These ordinances, and especially the Broad Gauge ordinance of December 20, 1887, which is set out as Exhibit 57 (Trans., p. 138) are broad enough to sustain every right which the company is now claiming. This ordinance of December 20, 1887, will expire by its terms on December 20, 1912.

It is true, as counsel contend, that the company has not been exercising the rights which it holds under these ordinances. It is gratifying to the appellee to observe that the appellant accepts the acts of the parties as conclusively determining this question. The contention of counsel, that the rights of the appellee under these ordinances have been abandoned, is another matter, and is unwarranted by the testimony. The freight ordinance (Ex. 51) was not enacted until February 4, 1895, which was between five and six years after the reorganization in 1889, and some five or six years subsequent to the time when counsel claim this abandonment was had. In that ordinance the city recognizes the other ordinances as in force, and expressly states that the present company was then the assignee of all of them. This ordinance says in section 1:

> That the tracks, railways and cars now or hereafter owned or operated by the Des Moines City Railway Company (the assignees of the Des Moines Street Railway Company, and all other companies to whom this city and the several cities and towns adjacent thereto and now embraced in and forming a part of the city of Des Moines, heretofore granted certain street railway franchises) may for the period, etc.

This affirmative recognition of the present company as the holder of these rights at that time is inconsistent with the present contention of the city that five or six years prior thereto they had been surrendered or abandoned.

Note in this connection the very significant fact that, as shown by the record, the present company was not organized until 1893, five years after it is now claimed that

these rights were abandoned. If they had been abandoned by its predecessor, would they have been assigned to this company, and would the city have thus formally recognized the fact of such assignment? Abandonment is always a matter of intention. The record to which we have referred shows that the parties did not intend, although there had been *non user*, to abandon these rights. The company had the right to accept two grants or three grants or four grants of this easement just as a private individual would have the right to accept from another private individual two or three or four leases running for varying terms.

In

Town of Golconda vs. Field, 108 Ill., 419,

there was a grant of an exclusive right to operate a ferry, and thereafter a right was granted to operate it for twenty years. The court held that the owner of the ferry had the right upon the expiration of the twenty years, to claim under the original grant since he had the right to claim under both of them.

Chamberlain vs. Iowa Telephone Co., 119 Ia., 619.
State ex rel. vs. Nebraska Telephone Co., 127 Ia. 194,

were both cases where there had been a legislative grant of a permanent telephone right, thereafter a grant for a limited term by a city ordinance, and finally upon the expiration of the grant by the city ordinance, a return to the rights conferred by the legislative grant. In each of these cases the supreme court of Iowa sustained the right of the telephone company to continue under the permanent legislative grant after the other grant had expired.

Authority to occupy streets not named in the original ordinances could be granted by a vote of the council without a vote of the people after the code of 1897 required such a vote in connection with grants of rights to maintain poles and wires.

145

Thurston vs. Huston, 123 Ia., 157.

These ordinances as well as all other general ordinances covered the enlarged city when its boundaries were extended in 1890.

Gas Light Co. vs. St. Louis, 46 Mo., 121.

This doctrine is recognized in

Blair vs. Chicago, 201 U. S., 400, 489,

where it is said:

> The ordinances of the city extend over the annexed territory immediately upon annexation. *Illinois Central Ry. Co. vs. City of Chicago*, 176 U. S., 646, and the limitations of the ordinances apply to the annexed territory.

The holding in the case referred to, *Illinois Central Ry Co. vs. City of Chicago*, was that a provision of the company's charter requiring the consent of the city to the location of the tracks was not limited in its effect to the city as it existed when the charter was granted, but was applicable in territory thereafter made a part of the city.

The argument of counsel upon these propositions ignores the most significant fact, that these ordinances were reenacted in 1900 as then in force as a part of the revised ordinances, ten years after the city was enlarged. This precludes any claim that they had been abandoned, or that they did not include the enlarged city.

In this connection counsel suggest in their argument that certain of these ordinances contain no words of assignability and are therefore not assignable. A complete answer to this contention is found in the extracts we have already made from the freight ordinance, showing an express recognition and assent on the part of the city to the assignment of all of these ordinances to the present company. It will not be contended that a municipality may not, in the absence

of words of assignability, consent to an assignment. That such rights as these are assignable is held in

New Orleans, etc., Ry. Co. vs. Delamore, 114 U. S., 501.
Detroit vs. Detroit Citizens' St. Ry. Co., 184 U. S., 368.
Louisville Trust Co. vs. City of Cincinnati, 76 Fed., 296.
Mayor of Knoxville vs. Africa, 77 Fed., 501.
Detroit Citizens' Street Ry. Co. vs. Detroit, 64 Fed., 628.
Light & Power Co. vs. Tacoma, 17 Wash., 661.
City Ry. Co. vs. Citizens' St. Ry. Co., 166 U. S., 557.
Morgan vs. Louisiana, 93 U. S., 217.

XI.

This case presents a Federal question and the jurisdiction is clear.

The circuit courts of the United States have original cognizance of all suits of a civil nature "arising under the Constitution or laws of the United States."

The recent case of

Northern Pac. Railroad Co. vs. Duluth, 208 U. S., 583,

obviates the necessity for any elaborate consideration of this question. A viaduct had been constructed over certain tracks of the railroad under a contract between the railroad and the city, whereby the railroad contributed $50,000 to the expense of the construction of the viaduct, and the city undertook to maintain it for the period of fifteen years. This contract was dated September 2, 1891. In 1903, the viaduct and its approaches having become dangerous, the city of Duluth acted within the power conferred on it by law to require railroad companies to construct approaches and viaducts at their own expense, and after investigating

the matter approved plans prepared by the city engineer, and June 13, 1903, passed the following resolutions:

> *Resolved*, That the repairs set forth in said specifications are necessary and proper and are demanded by the public safety and convenience.
>
> *Resolved further*, That said repairs are reasonable and practicable for the repair of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.
>
> *Resolved further*, That this council does hereby demand that the Northern Pacific Railroad Company immediately proceed to repair said viaduct and approaches in accordance with said specifications.
>
> *Resolved further*, That a copy of this resolution be forthwith served upon the Northern Pacific Railway Company in the same manner as service may be made of summons in a civil action by the city clerk.
>
> *Resolved further*, That in the event of the failure or refusal of said company to comply with such demands that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said railway company to make such repairs or such portion thereof as the court may determine it is legally liable to make.

After distinguishing

> *St. Paul Gas Light Co. vs. St. Paul* 181 U. S., 142, and
>
> *City of Dawson vs. Columbia Avenue Savings Fund Safe Deposit Title & Trust Company*, 197 U. S., 178,

upon which the appellant relies, the court holds that this resolution presents a case of a law in violation of the obligation of contract, saying:

> We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract or adds new duties or obligations

thereto, necessarily impairs the obligation of the contract, and when the State court gives effect to subsequent State or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court (*New Orleans Water Works Co. vs. La.*, 185 U. S., 336, 350, 351). And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights (*Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65, 81; *City of Cleveland vs. Railway Co.*, 194 U. S., 517). As was said in *City of Dawson vs. Columbia Avenue Savings Fund Safe Deposit Title & Trust Company*, 197 U. S., 178, it is not always easy to determine on which side of the line a given case may fall. But recurring to the resolution in this case we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits. * * * This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deem to be necessary. It requires legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question. We therefore think there is jurisdiction in the case.

In the case at bar the resolution not only denies that any contract exists, but it requires the company to destroy its property, and to remove its tracks from the streets; it changes the legal status of the company; it makes it, if the resolution is valid, a trespasser; it subjects it to prosecutions for maintaining a nuisance. Its effect is not only to impair, but to destroy these contract rights by depriving the company of their benefit. It not only imposes an expense, but it substantially destroys all of the property in which the company's capital is invested. The duty that it enjoins of removing the tracks is an affirmative duty. It might be enforced by mandamus, by a mandatory injunction, by indictment, or by the police forces of the city, without legal proceedings.

Mercantile Trust & Deposit Co. of Baltimore vs. City of Columbus, 203 U. S., 311, 322,

was a case where the municipality had enacted an ordinance contemplating the construction of a municipal water plant where there was a private company operating under an exclusive grant. The court says:

> In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect water works and to issue bonds in payment of the cost thereof, and the city was proceeding to avail itself of the power thus granted when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla City vs. Walla Walla Water Co.*, 172 U. S., 1; *Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S., 65, again reported 202 U. S., 453; *Davis, etc., Co. vs. Los Angeles*, 189 U. S., 207; *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22.

In

Shoshone Mining Co. vs. Rutter, 177 U. S., 507,

this court says that the suit must, in part at least, arise out of a controversy in regard to the operation and effect of the constitution, and that it must appear that it involves a dispute or controversy as to a right which depends upon the construction or effect of the constitution.

In

Saginaw Gas Light Co. vs. Saginaw, 28 Fed., 529,

the opinion was written by Mr. Justice Brown. The city having granted an exclusive gas ordinance, passed a resolution accepting a proposition from another company to erect a plant in the city. The jurisdiction was sustained.

Vicksburg Water Works Co. vs. Vicksburg, 185 U. S., 65,

arose out of a resolution in the following language:

> *Resolved*, That the mayor be and is hereby instructed to notify the Vicksburg Water Works Company that mayor and aldermen deny any liability upon any contract for the use of the water works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises.

The city also commenced a suit to cancel the ordinance. The legislature had authorized it to issue bonds and to acquire a water works system of its own. Under this act the city had voted an issue of bonds to buy or construct a plant. After having done this, it passed the foregoing resolution and commenced the suit referred to. This was held to present a Federal question.

In

Pacific Electric Railway Co. vs. Los Angeles, 194 U. S., 117,

the facts were as follows:

The law of California provided that these rights should be sold at auction. The appellant having applied to the city for a street railway right, the sale was had and the bid of E. Murray being the highest, it was ordered that the right be sold to him, and the city treasurer was directed to receive the money to be paid during the twenty-four hours expiring at 3:15 p. m., February 11, 1902. On that date the council declared the bid of Murray to be fraudulent and again took up the matter of a sale. The appellant bid $152,000; no other bids were made; the right was ordered sold to the appellant and it paid in the money which was accepted by the city. The council passed an ordinance granting the right to the appellant which was presented to the mayor, but was returned by him without his signature or approval, and with his objections. On February 21, the matter came before the council, which did not pass the ordinance over the mayor's veto. But the council passed a resolution attempting to reject all bids and ordering the refund of the money paid by the appellant. The court sustains the jurisdiction, notwithstanding that it ultimately held that there was no valid contract, saying:

> It will be observed that rights under the Fourteenth Amendment of the Constitution of the United States were explicitly asserted. Besides the Circuit Court treated the bill also as presenting for consideration rights under the contract clause of the constitution and entertained jurisdiction of the case on the authority of *Riverside, etc., R. Co. vs. Riverside*, 118 Fed. Rep., 736.

See also in this connection

City Railway Company vs. Citizens' Railway Company, 166 U. S., 562.

Walla Walla City vs. Walla Walla Water Company, 172 U. S., 1.

In

Iron Mountain Railroad Co. vs. Memphis, 96 Fed., 113,

the Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Taft, sustained the jurisdiction where the controversy was as to the right to maintain a railroad in a street and where the law impairing the obligation of the contract was a resolution stating that unless the railroad company should revise and adjust its rates, its failure so to do should work a forfeiture of its rights and that the city would then resume its possession and control of the premises.

In the case at bar the city, by the resolution in question, instead of threatening to resume possession and control, attempted to absolutely resume possession and control of these premises and to oust the company from the streets. Moreover, unless its contract afforded to the company protection in the case at bar, this resolution was absolutely valid and enforceable. We take but two sentences from Judge Taft's opinion. Referring to this resolution, he says:

> It impairs the obligation of a contract if it purports by force of law to authorize any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city it authorizes the city officers peaceably to take possession of the street and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them.

In

Riverside A. Ry. Co. vs. City of Riverside, et al., 118 Fed., 736,

the jurisdiction was sustained where the enactment was a resolution stating the price which the city would there-

after demand under a contract which it had made to furnish a supply of electric current, and providing further that if the company so desired it would continue to supply the current pending a suit to determine the rights of the parties.

These authorities amply sustain the conclusion of the court below that there was jurisdiction. It is unnecessary for us to answer in detail the authorities which counsel cite, because they are distinguished in the cases from this court to which we have called attention, especially in the *Duluth* case.

In support of their contention counsel urge that if the appellee is entitled to have the resolution in question declared void because in violation of the Federal Constitution it is also entitled to set up and maintain a like right under the State constitution. In other words, the proposition is that the appellee is deprived of its rights under the Federal Constitution because it may assert a like right under the state law. The Federal Constitution is the supreme law of every State. Its force as a binding obligation upon the states is not increased by re-enacting it, as a part of the law of any particular State, nor can the States by recognizing and re-enacting the Federal Constitution or Federal laws, deprive the citizens of a state of the rights which the Federal Constitution guarantees to them. Substantially all of the states have a contract clause in their constitutions. Those which do not have it may adopt it. This court is not without jurisdiction on these questions, which arise under the Federal Constitution merely because like questions could be raised under the State constitutions; a state may confer an additional right, but it cannot under the cloak of seeming generosity take away a right guaranteed by the Federal Constitution.

In view of the frequency with which this court has held that resolutions are laws within the sense of the constitutional provision, it is hardly necessary to reply to the argument of counsel that this inhibition does not include all legislation in violation of the obligation of contract, but

includes only such legislation as is in the permanent form of ordinances. What determines whether the law comes within the constitutional inhibition is not the form of the law, but its effect. The effect of this resolution would be to destroy the rights of the appellee under this contract. It would destroy them just as thoroughly as an ordinance to the same effect.

Counsel say further that there is no power to amend or repeal an ordinance by a resolution. This resolution does not purport to amend or repeal an ordinance. It proceeds upon the theory that there is no ordinance and that there has been none since the first of January, 1898. The whole argument of counsel is that since that time there has been nothing here to repeal or to amend. The resolution, under the authority of code section 767, granting the city the power to authorize or forbid the construction and maintenance of street railway tracks, attempts to forbid the further exercise of the rights granted under the Turner ordinance. The code of 1897 provides (section 917) that the title to the streets is in the city in trust for the public. By section 796 cities are charged with the duty of keeping streets open and free from obstructions and nuisances. By section 696 cities are authorized to abate nuisances, and they may use the police force if necessary. By sections 1302 and 5078, any unauthorized use of the streets is indictable as a nuisance. In the attempted exercise of these powers the city passed the resolution in question. It is the law in Iowa that a private person, sustaining special damages, may maintain an action for the abatement of a nuisance and for damages.

Elwell vs. Greenwood, 26 Ia., 377.
Gilchrist vs. City of Des Moines, 128 Iowa, 49.

It is conceded by counsel that

Merchants Union Barbed Wire Co. vs. C. R. I. & P. Ry. Co., 70 Ia., 105.

holds that the power to authorize or forbid street railway tracks may be exercised by resolution. It must be con-

ceded that the street railway cases in the 73d Iowa decide that the power was so exercised with reference to this particular grant.

In

Thurston vs. Houston, 123 Iowa, 157,

it is held that where an ordinance granted the right to occupy certain specified streets, and such streets as might thereafter be designated by the council, a designation by resolution is sufficient, even if made after a vote of the people had become necessary, as to poles and wires. It is contended by counsel that these cases are overruled by

Cascaden vs. Waterloo, 106 Iowa, 673.

The sole question involved in that case was whether a resolution creating a new ward in the city was valid. It involved no question as to any grant of power with reference to railroad or street railroad tracks. The *Barbed Wire Company* case is not overruled; it is held that there is a difference between a general enactment for the establishment of a ward and the grant of a right in a street.

Moreover, we submit that this entire discussion is beside the question. This resolution is not an enactment of a general or permanent nature. It is predicated upon the contention that the Turner rights expired in 1898, and is a direction that the tracks be removed. It is not intended to establish or create any permanent or semi-permanent rule of general operation. It undertakes to prohibit the continuance of a specified thing which the city claims is unauthorized and is an obstruction in the street. It is analogous to a resolution ordering the removal of a pile of dirt or a fence or any other obstruction in a public highway.

Counsel contend further that this was a mere administrative enactment, and that the city did not mean what it said by this resolution, and in support of this proposition rely upon the testimony of Mr. Brenner, the city solicitor. It should be remembered that a controversy was pending

before these resolutions were passed. *Quo warranto* suits had been brought in the State court by Fullerton and others, relators. The city was a defendant, but had not appeared. In view of this a petition was presented to the city council asking the city to co-operate with the relators in those suits (Trans., p. 361). Mr. Bremner, the city solicitor, made a report to the council upon this matter (Trans., p. 362). On November 20th, it appears (Trans., p. 364) that Mr. Whitney, a member of the council, had in his possession a resolution of which Mr. Bremner disapproved. Mr. Bremner says that "between noon of November 20th and the evening of November 21st the resolution was redrawn by me and some small changes made in the first and third paragraphs and the fourth paragraph entirely rewritten." The presumption is that this resolution means what it says.

In

Old Colony Trust Co. vs. City of Wichita, 123 Fed., 779,

the court said:

> What the city intended to do must be determined from the ordinance. It cannot be heard to say that it solemnly enacted an ordinance which it did not intend in good faith to enforce and in the mode and manner provided by the ordinance. The complainants had the right to act upon the theory that the city intended to do what it had solemnly declared by ordinance it would do and not to wait until the threatened wrong was done. It had the legal right to invoke the aid of the courts for protection against the wrong.

The argument of counsel is that this resolution was simply a resolution directing the city's solicitor to commence a suit or authorizing him to commence one. The complete answer to this proposition is that this is not what the resolution says. The appellee, when it read this resolution, could interpret it only as an order to tear up its tracks, with a further requirement that the city solicitor see that this was done. There is nothing in the resolution about the bringing of a

suit, and it must be assumed that the city intended to say what it did say and meant what it said. It has never repealed this resolution, nor modified it in any way.

The suggestion that a suit was to be brought to determine the rights of the company flatly contradicts the resolution which expressly and unequivocally determines and asserts that it has no rights which the city will respect.

This resolution operated to prohibit and render unlawful the extensions which the bill alleges and which the testimony shows it was necessary for the appellee to make.

Note that in the answer in which the defendant denies that it intends to interfere with the rights of the complainant, it also denies in paragraph thirty that the complainant has any rights under the ordinance that is in controversy. Note also that in paragraph 24 defendant admits that in order to successfully operate and maintain its system, the complainant will be required to make extensions, and that it expressly denies the existence of any contract authorizing this and denies the existence of any contract authorizing the operation of the existing system.

There remains the question of jurisdiction based upon the due process of law provision of the constitution. It can be presented in a nut-shell. The bill shows the existence of this right. The answer admits that this right has been at all times claimed by the company. The bill shows the passage of this resolution which says to the company unless you voluntarily destroy this property that you have acquired by virtue of this contract the city will destroy it for you. If this ordinance is valid, the unavoidable result is the taking of this property without due process of law.

The jurisdiction upon both grounds is clear.

XII.

There is jurisdiction in equity.

Counsel assert that there is no jurisdiction in equity in this proceeding, predicating this assertion upon the propo-

sition that injury by judicial proceedings is not an injury justifying an injunction. A sufficient answer to counsel is that this is not the basis upon which the jurisdiction is invoked. This resolution is a cloud upon the complainant's title. Resort to equity is necessary to avoid a multiplicity of suits. There are extensions which the company desires to build, which it cannot build in view of the city's attitude. That these extensions are necessary is admitted in the answer, and that this necessity arises not only on account of the obligations of the company to the public, but also in order to preserve its plant, is obvious and is conceded. It is equally clear that the damages incidental to a refusal to permit extensions could never be ascertained in an action at law.

We quote from

Blair vs. Chicago, 201 U. S., 448,

as follows:

> As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justifiable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking the Federal jurisdiction is immaterial (*South Dakota vs. North Carolina*, 192 U. S., 286, 310; *Dickerman vs. Northern Trust Co.*, 176 U. S., 181, 190; *Lehigh Mining & Manufacturing Company vs. Kelly*, 160 U. S., 327, 336; *Crawford vs. Neal*, 144 U. S., 585; *Cheever vs. Wilson*, 9 Wall., 108, 123; *Smith vs. Kernochen*, 7 How., 198, 216). * * * While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested

> the asserted rights of the corporation to the franchise to use the streets of the city for ninety-nine years, the term claimed to have been granted to them by the act of February, 1865. It was the claim of the city that as to many of the ordinances granting rights in a number of the streets, the right to the use and occupancy of them would expire July 30, 1903. The city had asserted in a number of ways its purpose to treat the rights of the companies and whatever franchises they had as terminated at that date. It declared its purpose to resume possession of the streets and resort to all legal means to protect its rights against what were deemed the unfounded claims of the companies as to the extended franchises. Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property which was in the hands of the receivers to be administered under the orders of the court, and that in such case the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of the claims of the parties which cast a cloud upon the franchises, and rights claimed by the company and the receivers, and that in such case it was proper to grant an injunction until the rights of the parties could be determined (*Detroit vs. Detroit Citizens' Street Railway Co.*, 184 U. S., 368; *In re Tyler*, 149 U. S., 164; *Rouse vs. Letcher*, 156 U. S., 47; *White vs. Ewing*, 159 U. S., 36). We think, then, that the court had jurisdiction of the case made in the ancillary bills.

Upon this question see also

> *Detroit vs. Detroit Citizens' Railroad Company*, 184 U. S., 368,

where it is said in response to the contention that the remedy at law is adequate:

> The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon

which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom, and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforce-

ment of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

We also make the following excerpt from

Cleveland vs. Cleveland City Railway Co., 194 U. S., 531:

> Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit vs. Detroit Citizens' Street Railway Co.*, 184 U. S., 368:

On this question also see

Vicksburg Water Works Co. vs. Vicksburg, supra,

where the court says:

> It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that

> mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries, which, if inflicted, would be wholly destructive of his rights.

Again in the *Memphis* case Judge Taft says (page 131):

> If this resolution violates the Federal Constitution there can be no doubt that complainant is entitled to equitable relief. It is certainly a cloud upon the title of the railroad company in its occupancy of the street which it may ask a court of equity to remove and to enjoin any claim under it.

The same claim was made in

Omaha Water Co. vs. City of Omaha, 147 Fed., 1.

Judge Sanborn wrote the opinion, and there held that an order by a water board fixing rates contrary to the provisions of the ordinance was a violation of the contract, and that this gave the court jurisdiction. The court says:

> Any reduction of those rates, any inhibition of agreements between the company and its consumers upon any rates not exceeding those there specified, necessarily deprives the company of that freedom to contract with its consumers and to collect from them which the city covenanted by this clause of the contract that it should enjoy.
>
> Any reduction of these rates necessarily impairs the obligation of this contract because it deprives the water company of the full benefit of the term of the contract which was most important and beneficial

to it. The order of the water board which purported to reduce the rates was made pursuant to a law of the State and it was therefore violative of section 10, article I, of the constitution and the bill states a good cause of action for an injunction to prevent its execution.

The city denies the complainant's right to make extensions. This resolution is a cloud upon the complainant's title. There are involved a multiplicity of public and private rights.

Counsel also urge that there is no jurisdiction in equity because they contend that the complainant secured the passage of the resolution of which complaint is made. This contention is absolutely without the support of any competent or incompetent evidence.

Reference is made to the testimony of Mr. Bremner on pages 366, 367 and 368. We have elsewhere referred to the testimony of Mr. Bremner, that he received this resolution from Mr. Whitney, a member of the council, and that he, Mr. Bremner, made radical changes in it. It is true the city solicitor testified that his understanding was that the original resolution—not the resolution that the council passed—was either prepared by the attorneys for the company or at their instance. This was objected to as incompetent and a motion was made to strike it out in view of the fact that Mr. Bremner had stated, in answer to interrogatory 15, page 366, that he had no personal knowledge on this question. This testimony was clearly incompetent and no effort was made to call any witnesses who had any personal knowledge with reference to the matter. Moreover, if competent, this evidence would only warrant the inference that the company had unsuccessfully attempted to tone down the city's action. It cannot be presumed that the company was actively aiding an effort to destroy it.

On page 367 Mr. Bremner states the substance of his conversation with Mr. Alberson. It does not appear that Mr.

Alberson had any authority to represent the company in this matter. It does not appear that Mr. Alberson, in any way, directly or indirectly, requested the passage of the resolution that was passed. On the contrary, he evidently desired something else which Mr. Brenner refused. He was also interested in the length of time which the company was to have to remove its tracks, which is hardly consistent with the theory that it was not understood that the resolution had anything to do with the removal of the tracks. Mr. Brenner nowhere claims that he even understood that the resolution that was passed emanated from the company.

As a matter of fact, the controversy was on. The answer shows that the city intended this resolution to constitute an affirmative movement in its attack on the company. Mr. Brenner states that he preferred the other forum. He says that the complainant preferred this forum. Neither is to be criticised for having a preference.

The attitude of the parties was hostile. Under these or any other circumstances complainant had the right to be interested in the form of this resolution. Both parties were of necessity interested in the matter. The fact that Mr. Brenner, representing the city, insisted upon drafting this resolution himself and refused to permit the passage of the resolution which he says he understood the company preferred, is only material as indicating an absence of any collusion.

We have printed, as an appendix to this brief, an opinion given by Judge Dillon upon the proper construction of this Turner ordinance, which clearly and concisely summarizes the considerations which lead to the conclusion that the grant made by the ordinance is without limit as to time.

We respectfully submit that the case should be affirmed.

NATHANIEL T. GUERNSEY,
WILLIAM L. READ,
GEORGE H. CARR,
ALONZO C. PARKER,
WILLIAM E. MILLER,
Solicitors for Appellee.

APPENDIX.

JUDGE DILLON'S OPINION.

DILLON & HUBBARD.
Attorneys & Counsellors at Law.

NEW YORK, *June* 28, 1906.

N. W. HARRIS & COMPANY,
Pine Street, Corner William Street, New York City.

DEAR SIRS:—

You have requested our opinion upon the following question, namely, whether the franchise and rights of the Des Moines City Railway Company to maintain and operate its railways upon the streets of the city of Des Moines absolutely expired on the first day of January, 1898, or whether such franchise and rights still exist and continue, and if so, the nature and duration thereof.

The present railway company is the assignee and successor, among others, of the Des Moines Street Railway Company.

On the tenth day of December, 1866, the city council of the city of Des Moines passed an ordinance entitled "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines" (Revised Ordinances of Des Moines, Compilation 1900, page 429). Section 1 of said ordinance is as follows:

> That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and conven-

> ient tracks for turn-outs, side tracks and switches, in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables, or car houses, and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner and for the time, and upon the conditions hereinafter mentioned and prescribed.

Section 2 provides that the cars to be used upon said tracks shall be operated with animal power only.

Sections 3 to 8, inclusive, relate to the purposes of the railway, manner of construction, etc., and do not otherwise materially bear upon the question submitted to us.

Section 9 provides as follows:

> This charter is granted and the rights and privileges herein conferred are subject to the following conditions and qualifications only, to-wit: The said company shall have at least one mile of said railway fully completed and equipped, and cars running thereon, by the first day of January, A. D. 1869. That they shall have one additional mile so completed and equipped, and cars running thereon, by the first day of January, A. D. 1872, unless the city council of said city shall grant to said company a further extension of time, and on the failure of said company to construct the number of miles of said railway within the time herein specified, all rights and privileges herein granted shall be forfeited, and revert to the city of Des Moines. * * *

The ordinance contains no other provision for any forfeiture of the rights and privileges which it grants to the company.

Section 10 is important and is as follows:

> The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years from the time the first mile of said track

> is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

This ordinance required acceptance by the company, and the same was duly accepted, and under and in pursuance of said ordinance said company proceeded to construct, and within the time limited did construct, lines of railway along various streets of the city of Des Moines.

In three cases which are reported in 73 Iowa Reports, page 513, between the *Des Moines Street Railroad Company*, *the Des Moines Broad Gauge Street Railway Company*, and the *City of Des Moines*, the construction and effect of said ordinance of December 10, 1866, were considered and determined in 1887 by the Supreme Court of Iowa, in which cases the validity of the exclusive features in said ordinance of 1866 was the special subject of contest, and it was held and decided that the said ordinance was valid and that under it said Des Moines Street Railway Company, its successors and assigns, had an exclusive right to operate street railways on the streets of the city during said thirty years. The supreme court decreed in said cause, among other things, as follows:

> It is further ordered, adjudged and decreed that the plaintiff (the Des Moines Street Railroad Company) under the ordinance of 1866 (said ordinance of December 10, 1866), as subsequently ratified and adopted by the defendant the city of Des Moines, Iowa, is entitled to the exclusive privilege of constructing and operating lines of street railway by animal power upon the streets of the city of Des Moines for *expiration of the thirty years.*

The decree above quoted finds that the term of thirty years began to run from the first day of January, 1868. The said

term of thirty years would therefore expire on the first day of January, 1898.

It has recently been claimed on behalf of the city that *eo instanti* on the expiration of the thirty years, namely, January 1, 1898, all right of the company to maintain, use and operate its railways on the streets of the city *ipso facto* ceased, and that after that date such right no longer continued or existed or now exists. Whether such claim is well founded, or whether the company, after January 1, 1898, and at this time, has the right to maintain, use, and operate its railways upon the streets of the city is the question which is submitted for our opinion.

We have made a careful examination of the constitution and laws of the State and of said city ordinance of December 10, 1866, and the various ordinances of the city of Des Moines amending said ordinance of December 10, 1866, including certain consolidation resolutions, so called, passed September 5, 1889 (Rev. Ord. 1900, page 443), and the ordinance of March 8, 1890 (Rev. Ord. 1900, page 434), and including the authorized Revision of the Ordinances of the city of Des Moines of 1900. In this Revision of 1900 it was ordered by resolution of the city council that

> the period of thirty years from the first day of January, 1868, and that the plaintiff company has the right to extend its lines of street railway track and operate the same by animal power upon any streets of the city of Des Moines.

That decree is in full force and effect. It is therefore conclusively settled by this decision of the Supreme Court of Iowa that the contract created by the acceptance of said ordinance by the company and by the construction of its railway constituted a valid contract between the city and the company, and this ordinance on its face runs to "successors and assigns." *The only question, therefore, that is open is as to the rights of the company after the said ordinance of December 10, 1866, among others, be published as being*

in full force and effect, which was accordingly done, and this action of the city council was taken more than two years after it is now claimed or suggested that the ordinance and all rights of the company thereunder had fully expired on January 1, 1898. We have examined all the resolutions and ordinances of the city council passed at various times from December 10, 1866, down to the first of January, 1898, and from the last-mentioned date to the date immediately prior to the giving of this opinion, relating to extensions of the said road, assessments for paving, etc., etc. We have also examined the decisions of the Supreme Court of Iowa relating to this company in the cases of *Railway Company vs. Railway Company*, 74 Iowa, 585 (decided June 4, 1888); *Teachout vs. Railroad Company*, 75 Iowa, 722 (May 17, 1888); and *Des Moines City Railway Company vs. Des Moines*, 90 Iowa, 770 (May 12, 1894). The last-mentioned case refers to the ordinance of 1866 and the prior decisions of the Supreme Court of the State in the following language:

> The plaintiff (the present company, the Des Moines City Railway Company) is the assignee and owner of the rights conferred upon the Des Moines Street Railway Company by an ordinance of the city of Des Moines passed in the year 1866, and of the railway system which has been constructed under that ordinance and the amendments thereto. Some questions arising under that ordinance were considered by this court in *Des Moines Street Railway vs. Des Moines Broad Gauge Street Ry. Co.*, 73 Iowa, 515; *Id.*, 74 Iowa, 586. *It was held in these cases, in effect, that the ordinance and its acceptance constituted a valid contract between the city and the street railway company.*

UPON SUCH EXAMINATION AND AFTER FULL CONSIDERATION, IT IS OUR OPINION THAT THE TRUE MEANING AND EFFECT OF THE ORDINANCE OF DECEMBER 10, 1866, WAS TO GRANT TO THE ORIGINAL DES MOINES STREET RAILWAY COMPANY, ITS SUCCESSORS AND ASSIGNS, AN EXCLUSIVE RIGHT

AS AGAINST ANY RIVAL OR COMPETING COMPANY FOR THE TERM OF THIRTY YEARS, WHICH PERIOD EXPIRED ON THE FIRST DAY OF JANUARY, 1898, AND THAT AFTER THE FIRST DAY OF JANUARY, 1898, THE SAID ORDINANCE GRANTED TO THE COMPANY THE CONTINUING RIGHT, BUT NO LONGER EXCLUSIVE, WITHOUT LIMITATION AS TO TIME, "TO KEEP, MAINTAIN, USE, AND OPERATE" ITS RAILWAY UNDER AND PURSUANT TO THE SAID ORDINANCE OF DECEMBER 10, 1866, AND THE VARIOUS AMENDMENTS THERETO, AND THAT SAID RIGHT IS STILL IN FULL FORCE AND EFFECT, EXCEPT THAT BY VIRTUE OF THE CONSOLIDATION PROCEEDINGS HAD IN 1889 AND 1890, AND THE RESOLUTION OF THE CITY COUNCIL ADOPTED SEPTEMBER 5, 1889 (SEE REVISED ORDINANCES OF 1900, P. 443), AND THE ORDINANCE OF MARCH 8, 1890 (REV. ORD. 1900, P. 434), THE COMPANY IS EXPRESSLY AUTHORIZED UPON THE ROADS ORIGINALLY CONSTRUCTED AND UPON ROADS ACQUIRED, OR THAT IT MIGHT THEREAFTER CONSTRUCT OR ACQUIRE, TO OPERATE ITS CARS BY ANIMAL POWER OR BY ELECTRICITY OR OTHER PRACTICAL MOTOR POWER.

The grounds and reasons for this conclusion, that the company's rights to maintain and operate its railways in and upon the streets of the city of Des Moines is a still existing and continuing right, but not an exclusive right after the said thirty-year period, are briefly as follows:

FIRST. *The terms and purposes of the grant contained in the ordinance of December 10, 1866.*—The language of section 1, above quoted, purports to be a present grant, consent, permission and authority of the city council of Des Moines to the Des Moines Street Railway Company, its successors and assigns, to lay a single or double track for passenger railway lines "upon and along all the streets of the city of Des Moines, with their present and future extensions and connections," and upon certain alleys; and said section concludes in the following words:

> Authority is hereby given said company, their successors and assigns, to keep, maintain, use and oper-

ate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed.

Among the conditions is one contained in section 9 above quoted, that the company shall have a certain mileage fully completed and equipped and cars running thereon by the first day of January, 1869, and a certain additional mileage completed and equipped and cars running thereon by the first day of January, 1872.

This grant was made at a comparatively early period in the history of Des Moines, and at a time when there were no street railways in the city. The obvious purpose of the grant was to secure the construction of railways upon the streets of the city for the public accommodation at the earliest practicable time. To accomplish this end the city did not propose to use either its money or its credit. The ordinance was, as held by the Supreme Court (73 Iowa, pp. 521 *et seq.*), an invitation and inducement to private capital to embark in the enterprise of constructing and operating such a system of railways. AT THE TIME WHEN THIS GRANT WAS MADE IT WAS NOT THE GENERAL PRACTICE TO MAKE SUCH GRANTS WITH ANY TIME LIMIT, AND IT MAY CONFIDENTLY BE STATED THAT IN IOWA IT WAS NOT THE PRACTICE TO MAKE MUNICIPAL GRANTS OF THIS KIND FOR LIMITED PERIODS OF TIME. The pressing object was to secure such public accommodations by the investment of private capital, and the insertion of a time limit was not regarded as of controlling importance. In the ordinance in question the municipality considered that it secured the public rights by the provision in section 7 limiting the rate of fare, by requiring the early construction and operation of the road, by other provisions relating to the manner of construction and operation, and by limiting the exclusive rights of the company to a period of thirty years.

IT IS SETTLED LAW THAT A GRANT OF THIS KIND UNDER LEGISLATIVE AUTHORITY BY A MUNICIPAL CORPORATION TO A

PRIVATE COMPANY, WHERE THERE IS IN THE LAW OR ORDINANCE NO LIMIT AS TO TIME AND NO RESERVED RIGHT OF REPEAL OR REVOCATION, GIVES A RIGHT TO MAINTAIN AND OPERATE THE ROADS WHICH IS WITHOUT LIMITATION AS TO TIME. THERE ARE MANY CASES TO THIS EFFECT. WE REFER ONLY TO A FEW, FOR THE PRINCIPLE ABOVE STATED CANNOT BE DISPUTED. THUS, IN THE GREAT CASE OF *People against O'Brien*, 111 N. Y., PAGE 1, WHERE THE GRANT OF THE FRANCHISE TO CONSTRUCT AND OPERATE THE ROAD WAS NOT BY THE TERMS OF THE RESOLUTION OF THE CITY COUNCIL LIMITED OR REVOCABLE, IT WAS HELD THAT THE GRANT WAS IN FEE VESTING THE GRANTEE WITH AN INTEREST WITHOUT LIMIT AS TO TIME, AND THAT THE RIGHTS SO GRANTED MIGHT BE EXERCISED BY THE CORPORATION OR WHOSOEVER LAWFULLY SUCCEEDS TO THEM. SEE ALSO THE CASE OF *Detroit vs. Detroit Citizens' Street Railway Company*, 184 U. S., 368, 393, *et seq.*, DECIDED BY THE SUPREME COURT OF THE UNITED STATES IN 1901.

IN THE ORDINANCE OF DECEMBER 10, 1866, THERE IS NO LIMIT AS TO TIME AND NO POWER OF REVOCATION OR REPEAL. ON THE CONTRARY, IT REQUIRED ACCEPTANCE. IT WAS ACCEPTED, AND BECAME, AS HELD BY THE SUPREME COURT OF IOWA, A VALID AND BINDING CONTRACT BETWEEN THE COMPANY AND THE CITY. THEREFORE THE RIGHTS GRANTED BY THIS ORDINANCE TO THE ORIGINAL GRANTEE COMPANY ARE WITHOUT LIMIT AS TO TIME UNLESS SUCH LIMIT IS TO BE FOUND IN THE ORDINANCE MAKING THE GRANT.

The only claim, if any, that can be made that the right is limited in point of time is founded on section 10, above quoted, of the ordinance of December 10, 1866. The purpose of section 10 when its language is carefully examined will be seen to be not to limit or cut down the rights which had been granted by section 1 of the ordinance, but, on the contrary, the purpose was to grant something to the company which it would not have under the terms of the grant as contained in section 1; for while under section 1 the

grant would be unlimited in point of duration, it would not be an exclusive grant, and the city would be at liberty at any time, so far as section 1 is concerned, to grant a similar right to any other company, or itself to build a railway on the streets of the city in competition with the grantee.

SECTION 10 WAS INTENDED FOR THE BENEFIT OF THE COMPANY AND ITS PURPOSE WAS TO DISABLE THE CITY DURING THE TERM OF THIRTY YEARS FROM THE TIME THE FIRST MILE OF TRACK WAS LAID AND CARS RUNNING THEREON FROM MAKING A SIMILAR GRANT TO ANY OTHER COMPANY, AND PERHAPS TO DISABLE THE CITY DURING THAT PERIOD FROM ITSELF CONSTRUCTING OF ATTEMPTING TO CONSTRUCT A COMPETING MUNICIPAL RAILWAY ON ITS OWN ACCOUNT. THAT SUCH WAS THE PURPOSE AND THE ONLY PURPOSE OF SECTION 10 APPEARS NOT ONLY FROM THE EXPRESS LANGUAGE, THAT THE "RIGHT HEREIN GRANTED SHALL BE *exclusive* FOR SAID TERM OF THIRTY YEARS," BUT ALSO FROM THE FURTHER LANGUAGE OF SAID SECTION, THAT "THE SAID CITY SHALL NOT UNTIL *after* THE EXPIRATION OF SAID TERM GRANT TO OR CONFER UPON ANY PERSON OR CORPORATION ANY PRIVILEGES WHICH WILL IMPAIR OR DESTROY THE RIGHTS AND PRIVILEGES HEREIN GRANTED TO SAID COMPANY." ALL OF THE PROVISIONS OF SECTION 10 MUST HAVE EFFECT GIVEN TO THEM, AND THE LAST CLAUSE OF SAID SECTION 10 IS WHOLLY MEANINGLESS IF THE GRANT TO THE DES MOINES STREET RAILWAY COMPANY ABSOLUTELY EXPIRED AT THE END OF THIRTY YEARS FROM THE TIME THE FIRST MILE OF TRACK WAS LAID AND CARS RUNNING THEREON; FOR IT WOULD BE ABSURD TO SPEAK OF A GRANT TO ANY PERSON OR CORPORATION WHICH WOULD IMPAIR OR DESTROY THE RIGHTS GRANTED TO THE DES MOINES STREET RAILWAY *after* THE EXPIRATION OF THE THIRTY YEARS, IF BY REASON OF THE EXPIRATION OF THE THIRTY YEARS THE COMPANY HAD CEASED TO HAVE ANY RIGHTS WHATEVER.

It is true that section 1 of this ordinance of December 10, 1866, states that the right to maintain and operate the

railway is to be "for the time and upon the conditions hereinafter mentioned and prescribed," but this, taken in connection with section 10, means that the company is to have an *exclusive* right to operate the street railways for the term of thirty years, and after that the right, but no longer exclusive, to continue to maintain and operate the same. This view gives effect to every provision of section 1 and section 10, while the contrary view, that all rights absolutely terminated at the expiration of thirty years, is inconsistent with the purpose of section 10 as above explained, and wholly nullifies the last clause of said section. It was decided by the Supreme Court in the above-mentioned cases in 73 Iowa 513, that by the ordinance the company was under an implied obligation to hold itself in readiness at all times to construct and operate so much track and upon such streets as the public convenience might require. The company was therefore under this continuing obligation to extend its roads from time to time as the public convenience demanded, and in a growing city like Des Moines it would almost inevitably happen that extensions would be made during the entire period of the exclusive right, for which in the nature of things, if all rights of the company were to end absolutely at the expiration of the thirty years, the company could get no adequate return.

The term "exclusive right" simply means that the company has the right to exclude any other person or corporation from pursuing the same business; that is, the right to exclude competition, and it is a right conferred upon the company for its own benefit (*St. Louis vs. Gas Light Co.* 70 Mo., 69, 118). And this is all that the words in section 10, "that the right herein granted to said company (by section 1) to operate said railway shall be exclusive for the term of thirty years," means, namely, that the company should have the right to exclude competition for thirty years, and after that its right to exclude competition should no longer exist if the city should so determine. It did not

mean, and was not intended to mean, that all of the company's rights should *ipso facto* cease at the end of thirty years, but only its right longer to exclude competition. This was a club, so to speak, that the city retained to compel the company at the end of thirty years to deal fairly with it and the public, or the city might grant a competitive right to another company. It was not its purpose to drive the existing company out of the streets and destroy the value of its property, merely to grant similar rights to another company. This would destroy instead of securing competition. THIS CONSIDERATION OF ITSELF, EVEN WITHOUT THE CONCURRENCE AND SUPPORT OF THE LAST SENTENCE OF SECTION 10, DEMONSTRATES THAT IT MUST HAVE BEEN THE INTENTION IN SECTION 10 NOT TO CUT DOWN THE GRANT IN SECTION 1 TO THIRTY YEARS, BUT ONLY TO PROVIDE FOR COMPETITION IF THE CITY SHOULD SO DETERMINE AFTER THE EXPIRATION OF THE THIRTY YEARS.

If it had been the understanding of the city and the company that all the company's rights should *ipso facto* cease at the end of thirty years, the contract would naturally have so provided in express terms. Who was to own the rails and the cars at the end of the thirty years, the company or the city? The ordinance is silent on that subject. At the end of the thirty years, who was to serve the public by the use and operation of this road, which would be the only road in the city? On this the ordinance is silent. If the cars, rails and property belonged to the company, and there is no provision to the contrary, the company would have the right to remove them, and the city would be deprived of this public facility and left without any street railway whatever. It is not reasonable to suppose, if the understanding was that the company was to have no right whatever to maintain and operate its railways after the expiration of the thirty years, that the ordinance would have been silent on these vital and all important questions. On the contrary, if the true construction is, as we main-

tain, that after the thirty years there was a continuing, but not exclusive right in this company, the ordinance would have been left silent on these matters, just as it was. Nothing more was needed. The company at the end of the thirty years would of course own its rails, cars and property, and on the one hand would have the right, and on the other be under the duty, to maintain and operate its railways under and pursuant to the provisions of the ordinance just as much after the expiration of the thirty years as during that period.

We have been informed that said Des Moines ordinance of December 10, 1866, was modeled on an ordinance of the city of Indianapolis passed January 18, 1864, certain provisions of which are set forth in the case of *Citizens' Street Railway Co. vs. City Railway Co.*, 64 Fed. Rep. 647, (decided November 10, 1894). The language of sections 1 and 15 of said Indianapolis ordinance of January 18, 1864, are as follows, Id. 648:

> SECTION 1. Under and by virtue of an act of the General Assembly of the State of Indiana, entitled "An act to provide for the incorporation of street railroad companies," approved June 4, 1861, and by virtue of the powers and authority of the common council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the company, organized with R. B. Catherwood as president a body politic and corporate, by the name of the "Citizens' Street Railway Company of Indianapolis," and their successors to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turn-outs, side-tracks, and switches, in, upon and along the course of the streets and alleys of the city of Indianapolis, hereinafter mentioned; and to keep, maintain, use and operate thereon railway cars and carriages, in the manner, and for the time, and upon the conditions, hereinafter prescribed.
>
> SECTION 15. The right to operate said railway shall extend to the full time of thirty years from the pas-

> sage thereof; and the said city of Indianapolis shall not, during all the time to which the privileges hereby granted to said company shall extend, grant to, or confer upon any person or corporation any privilege which will impair or destroy the right and privileges herein granted to the said company.

In said section 15 of said Indianapolis ordinance the provision is "the right to operate said railway shall extend to the full term of thirty years from the passage hereof," etc., etc.

If it had been intended in the Des Moines ordinance that the right of the railway company to operate its road should extend only to the term of thirty years, how easy and natural it would have been to follow the language of said section 15. The language in section 10 of the Des Moines ordinance is that "the right herein granted to said company to operate said railway shall be exclusive for the term of thirty years," etc., etc., and in addition to the implication which this carries, that the right was to continue *after* the thirty years, come the express words that said city of Des Moines shall not until after the expiration of thirty years grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company. These words expressly recognize rights and privileges of said company "after the expiration of said term." Here, again, note the difference in language in section 15 from the Indianapolis ordinance above quoted: "and the said city of Indianapolis shall not during all the time to which the privileges hereby granted shall extend grant to or confer upon any person or corporation any privileges which shall impair or destroy the rights and privileges herein granted to the said company." In other words, the prohibition to confer any privileges upon any other person or corporation is one which exists during the term of thirty years. Nothing is said or implied in the language in section 15 of the Indianapolis ordinance as to the existence of any rights of the company

after the expiration of the thirty years' term, while in section 10 of the Des Moines ordinance it is implied that after the expiration of said term the company continues to have "rights and privileges."

Section 1 of said Indianapolis ordinance above quoted is substantially the same as section 1 of the Des Moines ordinance, "and to keep, use and operate thereon railway cars and carriages, in the manner, and for the time, and upon the conditions hereinafter prescribed." The words "for the time" in the first section of the Des Moines ordinance were obviously copied from the Indianapolis ordinance. In the case of the Des Moines ordinance these words "for the time" look forward so far as the exclusive right of the railway is concerned, to the provisions of section 10 of that ordinance, namely, that such exclusive right shall be for the term of thirty years; so far as the rights of the company after the thirty years are concerned, these are left where the rest of the ordinance leaves them notwithstanding the use of the words "for the time;" and the rest of the ordinance leaves the rights unlimited as to time.

In connection with this, it may be stated that an ordinance was passed by the town council of the town of North Des Moines May 9, 1885, which apparently was drafted either from this Des Moines ordinance of December 10, 1866, or from the said Indianapolis ordinance. The first section of said ordinance of 1885 uses the words "for the time and upon the conditions hereinafter mentioned and prescribed." See this ordinance—Des Moines Revised Ordinances 1900, page 460. We have looked through this ordinance of 1885, and do not find that the time for the maintenance and duration of the railway is thereafter mentioned or prescribed in said ordinance. If the same thing had been true in the Des Moines ordinance of December 10, 1866, clearly the use of the words "for the time" would not have prevented the right of the railway company from being a continuing right. No more ought the provisions of section 10 of said ordinance of 1866 (which were designed

to give the company the additional benefit of an exclusive right for thirty years and which implied a general right, not exclusive, to continue after thirty years) to be held, by reason of the existence of the words "for the time" in section 1 of said ordinance of 1866, to cut down the right of the company to thirty years.

SECOND. This conclusion, based upon the language, history, nature and purpose of the ordinance of December 10, 1866, as construed by the Supreme Court of Iowa, is supported by the *practical construction, without exception, which has been placed upon this ordinance from* 1866 *to the present time.* It is supported by fair inference, at least, in the decisions of the Supreme Court of Iowa above cited.

Some of the more material facts relating to the practical construction of this ordinance by the city and the company and the public are the following:

(1) The city solicitor of Des Moines, in the case of 73 Iowa, 513, to which the city was a party, filed a petition for a rehearing in the Supreme Court, IN WHICH IT WAS STATED THAT THE ORDINANCE OF 1866 GRANTED A *perpetual right* IN THE STREETS WHICH WAS EXCLUSIVE FOR THE TERM OF THIRTY YEARS, FOR WHICH REASON THE CITY CLAIMED THAT THE ORDINANCE WAS SO UNREASONABLE THAT IT WAS VOID. Said petition for rehearing states *inter alia*, as follows:

> It (the ordinance of 1866) gives to the plaintiff company the right in perpetuity to occupy all the streets and alleys with single or double tracks of street railway, and requires that they shall be operated by animal power only. There is no limit of time upon this right * * * the only limitation upon this grant is contained in section 10 in these words: "The rights herein granted to said company to operate said railway shall be exclusive for thirty years from the time the first mile of said track is laid and cars running thereon." This, we submit, only relates to the exclusiveness of the right and leaves the company

with its property interest and all the tracks single or double that it may have laid during this long term of years.

(2) In 1889 and 1890 question arose as to the consolidation of the street railway properties in Des Moines and their "electrification" and the investment of a large amount of money in these properties to effect this purpose. If this franchise of 1866 expired at the end of thirty years from the time the first rail was laid, to-wit, January 1, 1898, then the proposition before the people who were to advance this money, and before the city—which co-operated in these proceedings by passing the resolution of September 5, 1889 (Ordinances of 1900, page 443), and the ordinance of March 8, 1890 (*Id.*, page 434), was, that all this new and expensive work was to be done, new cars bought, electric power installed, a new power-house built, narrow-gauge lines made broad-gauge, and new rails laid, etc., etc., and all the money advanced for this purpose on the strength of a franchise which would continue for only eight years. It is obvious that neither the city authorities nor the owners of the railway properties, nor the persons who invested their money in the securities of the company, could have contemplated any such investment if the franchise had only eight years to run.

(3) We are informed that on January 1, 1898, on which date it has been suggested that the company's franchise under the act of 1866 expired, the company had 202,840 feet of track; that since January 1, 1898, 135,849 feet of this have been rebuilt, and that 199,478 feet of new track were laid after January 1, 1898, and prior to December 31, 1905; that on December 31, 1905, there were 76.49 miles of track, of which 12.78 miles were laid prior to January 1, 1898, and 63.71 miles were laid after January 1, 1898; and this work was done, not only without protest or objection on the part of the city, but in co-operation with the city, as is shown by what follows:

(4) Since January 1, 1898, the company has been assessed by the city for paving between the rails of its tracks at least $29,000. Two such assessments were made in 1905, and one made in 1906.

(5) The company is required * * * where it occupies a street paved prior to the track being laid upon it, to have the value of the paving assessed and to pay to the city treasurer the amount of such assessment. We are informed that since January 1, 1898, track of this kind has been laid of 26,923.3 feet, and the company has paid on account of such city assessments for paving approximately $10,000, and this $10,000 has been distributed pro rata among the owners of abutting property.

(6) Under an ordinance passed March 28, 1899, the company with the acquiescence of the city has equipped its cars with fenders, expending on that account approximately $4,500.

(7) Since January 1, 1898, the company has built a new fireproof power house, with new engines, boilers and generators, and also built new shops, and also spent a large amount on account of new equipment for use upon said railways.

(8) The last mortgage or trust deed of the company is dated April 1, 1901. Under this approximately $2,950,000 bonds have been issued. Since the date of this trust deed the proceeds of $1,715,000 of these bonds have been used for extensions, improvements and betterments of the plant of the company. Since January 1, 1889, we are informed that the net earnings of the company, after payment of the interest, have all been applied to the same purposes, and that the company has never paid any dividends.

(9) We referred above to the fact that the compilation of the ordinances of the city made by Mr. Baily and adopted

by resolution of the council of the city and published as the revised ordinances of 1900, contained this ordinance of December 10, 1866, *as being still in force*. (See Revised Ordinances 1900, pages 3 and 4.)

(10) Since January 1, 1898, a number of resolutions have been passed by the city council directing the laying of tracks by the company in various places where it was proposed to lay them either not in the center of the street or in some unusual way.

In these and in numerous other ways the practical construction which has been placed by all upon this ordinance since December 10, 1866; that is, by the city, by the railway company, and by the investors, and everything that has been done, is, that the right of the company was exclusive for thirty years, and after that a continuing right, but not exclusive. There is not so far as we have been advised or can learn one solitary instance of any action on the part of the city inconsistent with such view until the recent controversy was commenced.

WE HAVE SHOWN ABOVE THAT THE GRANT BY THE CITY TO THE COMPANY IS NOT AMBIGUOUS. BUT IF IT WERE, SUCH AN OPEN, PUBLIC, UNIFORM, UNVARYING, PRACTICAL CONSTRUCTION BY THE CITY AND THE COMPANY, EVIDENCED BY SO MANY ACTS REQUIRED OR ASSENTED TO BY THE CITY, ALL IMPLYING AND BASED UPON THE CONTINUED EXISTENCE OF THE ORDINANCE OF 1866 AFTER AS WELL AS BEFORE THE EXPIRATION OF THE THIRTY YEARS, AND THE DUTY AS WELL AS THE RIGHT OF THE COMPANY AFTER THE THIRTY YEARS TO EXTEND AND OPERATE ITS RAILWAYS—SUCH A PRACTICAL CONSTRUCTION, IF NOT AN ACTUAL ESTOPPEL ON THE CITY, IS, AT THE VERY LEAST, CONVINCING PROOF THAT THE REAL UNDERSTANDING AND PURPOSE OF THE PARTIES IN THE PASSAGE AND ACCEPTANCE OF THE ORDINANCE OF 1866 WAS THAT WHICH IS MANIFESTED AND SHOWN BY THIS UNEQUIVOCAL PRACTICE UNDER IT BOTH DURING THE THIRTY YEARS AND CONTINUOUSLY DOWN TO A VERY RECENT DATE. A MAP OF

THE COMPANY'S SYSTEM, IN WHICH IS DELINEATED THE ROADS OF THE COMPANY AS THEY EXISTED JANUARY 1, 1898, AND AS THEY EXIST TODAY, WILL SHOW THAT, AS ABOVE STATED, APPROXIMATELY FIVE-SIXTHS OF THE EXISTING RAILWAYS HAVE AT AN EXPENSE RUNNING INTO MILLIONS BEEN REBUILT OR NEWLY BUILT, MUCH OF IT AT THE REQUEST AND ALL WITH THE SANCTION OF THE CITY SINCE JANUARY 1, 1898; THAT IS, AT A TIME WHEN IT IS NOW SUGGESTED THAT THE COMPANY'S RIGHTS HAD WHOLLY EXPIRED. WE THINK NO COURT OUGHT TO SUSTAIN SUCH AN UNJUST PRETENSION.

FOR THESE REASONS WE ARE OF THE OPINION THAT ONLY THE COMPANY'S EXCLUSIVE RIGHT ENDED ON JANUARY 1, 1898, AND WE ARE FURTHER OF OPINION THAT THE COMPANY HAS THE CONTINUING RIGHT TO MAINTAIN AND OPERATE ITS RAILWAYS ON THE STREETS OF THE CITY, AS IT IS NOW DOING, AND THAT ITS RIGHTS IN THIS RESPECT ARE VESTED, CONTRACT AND PROPERTY RIGHTS, WHICH WILL CONTINUE AS LONG AS THE COMPANY PERFORMS THE DUTIES REQUIRED OF IT BY LAW, AND WHICH CANNOT BE TERMINATED OR IMPAIRED BY THE CITY, OR EVEN THE LEGISLATURE, WITHOUT THE CONSENT OF THE COMPANY.

Very truly yours,

JOHN F. DILLON.
DILLON & HUBBARD.

Brief and Argument for Appellant

Supreme Court of the United States

OCTOBER TERM, 1908

No. 171

CITY OF DES MOINES, APPELLANT

vs.

DES MOINES CITY RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

WM. H. BAILY,
HOWARD J. CLARK,
WM. H. BREMNER,
R. O. BRENNAN,
Attorneys and Counsellors for Appellant.

(20840)

Brief and Argument for Appellant.

STATEMENT.

On the 21st day of November, 1905, the City Council of the City of Des Moines passed a resolution in words and figures as follows, to-wit:

"Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Inter Urban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines; and,

"Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible,

"Be it Resolved by the City Council of the City of Des Moines: That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five (25) days after the passage of this resolution.

"Be It Further Resolved: That should the said railway companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be It Further Resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

(Record, page 15.)

Thereafter, and on the 24th day of November, 1905, a copy of said resolution was served upon the Des Moines City Railway Company.

(Record, page 15.)

Thereafter, and on the 27th day of November, 1905, the complainant, Des Moines City Railway Company, exhibited its bill in the Circuit Court of the United States, Southern District of Iowa, Central Division, claiming that it is a corporation organized and existing by virtue of the laws of the State of Iowa, with its principal place of business in the City of Des Moines, for the purpose of carrying on a rail-

way and street railway business; and that the respondent, the City of Des Moines, is a city of the first class, organized under the general laws of the State of Iowa relative to municipal corporations.

That on the 10th day of December, 1866, the respondent enacted an ordinance entitled, "An Ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," the material part of which ordinance is as follows:

"Section 1. That consent, permission and authority is hereby given and granted to and duly vested in the Des Moines Street Railway Company, and their successors and assigns, to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks and switches in, upon and along all the streets, and such alleys only fronting on which said company have depots, stables or car-houses, and over the bridges and on such streets in the City of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, *and for the time*, and upon the conditions hereinafter mentioned and prescribed.

"Section 10. The right herein granted to said company to operate said railway, shall be exclusive for the term of thirty years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company.

"Section 13. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations, to-wit: (there being eleven rules and regulations specifically set out.)

"Section 14. Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted, this ordinance shall operate as a contract between the City and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever."

That the complainant, within the time provided, filed its written acceptance of the ordinance with the proper authorities.

That the grantee in said ordinance complied with the terms thereof, and at all times, in reliance upon the terms and conditions of the con-

tract, evidenced by said ordinance, expended large sums of money in the construction, maintenance and operation of its lines of street railway in the streets of the respondent.

That afterwards, and on the 1st day of July, 1886, the Des Moines Street Railway Company, grantee, sold and transferred to the Des Moines Street Railroad Company all of its property, including the rights, privileges and franchises granted by the ordinance of December 10, 1866. That thereafter, certain controversies arose between the Des Moines Street Railroad Company and the City of Des Moines, wherein it was decided by the Supreme Court of Iowa, (73 Iowa, page 513; 74 Iowa, page 585), that the Des Moines Street Railroad Company, as assignee, had the exclusive right to maintain and operate a street railroad over the streets, alleys and public places of the City of Des Moines for thirty (30) years from the 10th day of December, 1866.

That on the 9th day of November, 1883, the respondent passed an ordinance authorizing the construction and operation of street railroads in South Des Moines, such permission and authority being given to the Des Moines & Sevastopol Railway Company, its successors and assigns, which ordinance was accepted by the grantee.

That on the 20th day of December, 1887, the respondent passed an ordinance, granting to the Des Moines Broad Guage Street Railway Company, its successors or assigns, authority to maintain and operate, by electricity or other motive power, other than animal or steam power, a street railroad on any street, single or double track, standard or broad guage street railway tracks.

That numerous controversies had arisen between the various street railway companies owning franchises in the City of Des Moines and the respondent, relative to the rights of said companies under the grants referred to. That negotiations were entered into for the consolidation of all of the street railway companies in the City of Des Moines, subject to the consent and approval of the respondent, which consent and approval were given by the respondent and accepted by the complainant.

That thereafter and on the 8th day of March, 1890, the respondent enacted an ordinance amending the ordinance of December 10, 1866,

and providing that the cars to be used upon the railway tracks constructed under and pursuant to the ordinance "or acquired by said company or its assigns, or that hereafter may be constructed or acquired, shall be operated by animal power or by electricity or other practical motor power;" and also providing that the rates of fare on any line or road of said company's railway shall not exceed five (5) cents, and otherwise modifying the rules governing the operation of such railways. That such ordinance was accepted by the Des Moines Street Railroad Company.

That at the time of the adoption of this ordinance, the City of Des Moines had the "power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled."

That on the 20th day of June, 1886, the respondent adopted an ordinance, authorizing the Des Moines Broad Guage Street Railway Company to construct and operate street railways in the City of Des Moines, and defining the powers and duties of said company, which said ordinance was accepted by the grantee.

That on or about the 16th day of May, 1888, the respondent granted to the Des Moines Belt Line Railway Company the right to construct, maintain and operate its railways along and upon certain streets in the city.

That on the 20th day of September, 1888, the respondent granted to the Des Moines River Line Street Railway Company the right to construct and operate a street railway in certain streets of the city.

That on the 14th day of May, 1888, the City of Des Moines granted to the Des Moines Rapid Transit Company, the right to construct, maintain and operate its railway along and upon certain streets in the City of Des Moines, and on the 21st day of August, 1888, enacted a further ordinance, purporting to grant to the Des Moines Rapid Transit Company certain rights to operate street railways in the City of Des Moines, which ordinance was duly accepted.

That all of the franchises heretofore referred to were assigned to the Des Moines Suburban Railway Company, and by that company and the Des Moines Street Railroad Company, assigned to the complainant, the Des Moines City Railway Company, and that the com-

plainant has ever since been the owner of said rights, privileges and franchises, and is and ever since that time has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines.

That the City of Des Moines has recognized the complainant as assignee and holder of the rights, privileges and franchises referred to, and assented without objection or protest to the exercise of such rights, privileges and franchises by the complainant. That the ordinance of December 10, 1866, as amended, constitutes a contract between the complainant and the respondent, whereby there is vested in the complainant, the right, subject only to the restrictions and conditions specified in said ordinance, and unlimited as to time, to construct maintain and operate an electric street railway system in the streets and alleys and over the bridges of the City of Des Moines, which right was exclusive for the term of thirty (30) years from and after the 1st day of January, 1868.

"Par. 30. That the expenditures of your orator in acquiring said street railway system and the various other franchises, rights and privileges granted by said city of Des Moines and acquired by your orator, as hereinbefore set out, and its expenditures thereafter made in re-building, extending and maintaining said street railway system, and the equipment therefor, and the appurtenances thereto, were all made by your orator in reliance upon the sanctity of the said contract evidenced by the said ordinance of December 10, 1866, as amended, and the acceptances thereof."

"Par. 31. That the said City of Des Moines has, by a long series of acts and enactments during a long series of years, uniformly treated the said ordinance as a contract as above set out, and has by the enactment of many ordinances and resolutions since the year 1890, uniformly recognized the said ordinance of December 10th, 1866, as a contract, and interpreted it as hereinbefore set o

That in reliance upon the ordinance of December 10, 1866, as constituting a contract, the complainant has expended large sums of money in the equipment, maintenance and operation of its railway system. That in addition to the construction, maintenance and operation of said railway system, the City, from time to time, required and com-

pelled the complainant to make changes in its lines of street railway and extensions thereof, and lay and re-lay and pay the cost of paving upon streets upon which its lines were located, amounting to many thousands of dollars. That the complainant is about to enter upon certain streets within said city for the purpose of laying its tracks thereon in accordance with the terms and provisions of the ordinances hereinbefore set out, and that the construction of said proposed extension is necessary for the successful operation of a street railway system, and in order to furnish to the public in said city, adequate street railway facilities. That the respondent intends to and is about to interfere with complainant's right under the contract, and threatens to and will, unless restrained by the orders of court, interfere therewith, and with the rights of complainant to maintain and operate its tracks already constructed in the streets of the City, and to that end and for that purpose, the City Council did, on or about the 20th day of November, 1905, pass the resolution heretofore referred to, and caused a copy of the same to be served on the complainant.

That the respondent denied the complainant's right, under the contract and ordinances above set out, to build additional lines and to maintain or operate its lines already constructed, and is about to and will interfere with and attempt to prevent complainant from building any such lines or extensions, and will interfere with and attempt to prevent complainant from maintaining the lines already constructed and now owned and operated by it, unless enjoined from so doing by the court. That it is the intention of the respondent to claim and enforce a forfeiture of the complainant's rights and privileges under said ordinances and contract referred to herein, and that so to do would result in immediate, great and irreparable injury to the complainant. That in order to construct and equip its railway system, the complainant has been compelled to borrow large sums of money, and that as evidence of such indebtedness, there have been issued and are now outstanding bonds in a large amount, which sums are secured by a trust deed upon the property of the complainant. That for respondent to interfere with the complainant's exercise of its rights under the contract and ordinances by removing its tracks, or taking steps looking to their removal, or by interfering with its continued operation, or by preventing the making of necessary extensions, the respondent will slander

and discredit complainant's title to the franchises and property, and impair its credit and embarrass its future operations.

That the complainant has a vested property right under and by virtue of the ordinance of December 10, 1866, as amended, as well as under the other ordinances hereinbefore referred to; and that to forfeit such rights or to dispossess the complainant of the same, or to interfere with its exercise and enjoyment of them, will cause great, direct, immediate and irreparable injury to such vested rights and to the complainant. That the adoption of the resolution by the respondent on the 21st day of November, 1905, as heretofore referred to, and any enforcement of the terms and provisions thereof, are in violation of the Constitution of the United States, and particularly of Section 10 of Article I thereof, and of Article XIV of the amendments thereto, in that they impair the obligations of complainant's contracts with the respondent, and if enforced against complainant, will take its property and property rights without due process of law. That the complainant has no plain, speedy and adequate remedy at law, and that unless it can have relief in equity, it is remediless. That this suit is in equity, of a civil nature, and that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of Five Thousand Dollars ($5,000.00).

That this cause is a suit arising under the Constitution of the United States in this: that the complainant seeks relief against the respondent by reason of an attempt on the part of the respondent to enforce against the complainant the resolution of the City Council of the City of Des Moines heretofore set out. That the resolution and the action contemplated thereunder impairs and is in violation of the obligation of the contracts between the complainant and the respondent, and if enforced, would take complainant's property without due process of law and deny to it the equal protection of the law in violation and in contravention of the provisions of the Constitution of the United States, and especially in violation of Section 1 of Article XIV of the amendments to the Constitution of the United States, and of Section 10 of Article I of the Constitution of the United States.

The complainant prayed that it might have the relief to which it is justly entitled in the premises, and that the respondent, the City of Des Moines, its City Council, officers, agents, servants and representatives, and each one of them, be perpetually enjoined and restrained

by the order and decree of this court from proceeding further in the premises, and from in any way interfering with the complainant's rights under said contracts, ordinances and enactments, and that the resolution of the City Council of the respondent, enacted November 21, 1905, requiring the removal of complainant's tracks, etc., be decreed to be void, and that the said City of Des Moines, its City Council, officers, agents, servants and representatives, including its City Solicitor, be perpetually enjoined from proceeding thereunder to enforce the same, and from in any manner obstructing or interfering with complainant's free use and comfortable enjoyment of its property, rights, franchises and privileges, and that the complainant have a temporary injunction pending the final disposition of this suit.

(Record, page 1 to 22, both inclusive.)

That thereafter, and on the 1st day of January, 1906, the respondent filed its answer to the bill of complaint, wherein it alleged that it admitted that the complainant, Des Moines City Railway Company, is a corporation, organized and existing by virtue of the laws of the State of Iowa; that it was organized on the 24th day of July, 1893, for the purpose of carrying on a railway and street railway business, the general nature of which was stated in Paragraph 1 of complainant's complaint.

That the City of Des Moines is a city of the first class, organized under the general laws of the State of Iowa, having all of the powers vested by such laws in such municipal corporations.

That on the 10th day of December, 1866, the City of Des Moines duly enacted an ordinance authorizing the construction and operation of a certain street railroad in and along the streets of the City of Des Moines, Iowa, a copy of which is attached to complainant's bill as Exhibit "A." That it admits the allegations set forth in Paragraphs 4, 5 and 6 of the bill of complaint, and that it has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7; therefore, denies the same.

That the Des Moines Street Railroad Company is a street railway corporation, created and existing by virtue of the laws of the State of Iowa, and that it purchased from the Des Moines Street Railway Company all of its street railway property, including all of its tracks and

equipments used in the operation of the same, about the 1st day of July, 1886; but denies that the Des Moines Street Railroad Company purchased the rights, privileges and franchises granted by the ordinance of December 10, 1866, as amended, but it admits that it attempted to do so.

That it admits that controversies arose between the Des Moines Street Railroad Company and the respondent and between the Des Moines Street Railway Company and other companies, to which the City of Des Moines had granted certain street railway privileges, which controversies resulted in litigation between the Des Moines Street Railroad Company and the City and other companies; but denies that the Supreme Court of Iowa decided that the ordinance of December 10, 1866, as amended, constituted and was a valid, enforceable contract between the said Des Moines Street Railroad Company and the City of Des Moines, but avers that in the case referred to in paragraph 9 of the Bill of Complaint, no question was raised as to whether said ordinance constituted a valid, enforceable contract in the hands of the Des Moines Street Railroad Company.

That it admits the allegations contained in Paragraphs 10, 11, 12, 13 and 14 of the bill of complaint, and that on the 8th day of March, 1890, the City of Des Moines further amended said ordinance of December 10, 1866, substantially as set forth in Paragraph 15 of the bill of complaint, and that such ordinance was accepted by the Des Moines Street Railroad Company; and further admits that the provisions of Chapter 11, Acts of the Twenty-third General Assembly of the State of Iowa, were substantially as claimed in paragraph 15 of the Bill of Complaint, but denied that the ordinance of 1890 was re-enacted in 1874, but avers that the revision adopted in said year was simply a collection of the ordinances then believed to be in force; denies that on the 6th day of October, 1879, the City re-enacted the ordinance of 1866, but admits the allegations contained in Paragraphs 19, 20, 21, 22, 23, and 24 of the Bill of Complaint, but denies the allegations contained in Paragraph 25 of the Bill of Complaint.

The respondent admits that on or about the 25th day of August, 1893, an attempt was made by the Des Moines Street Railroad Company and other companies operating street railways in the City of Des Moines, to transfer and assign to the Des Moines City Railway Com-

pany, the complainant, all of their street railways and properties in the City of Des Moines, and in the towns adjacent thereto, together with all the rights, privileges and franchises granted by the City of Des Moines and by the municipalities subsequently incorporated therein under the various ordinances referred to in the Bill of Complaint, but that the respondent believes that the Des Moines Street Railroad Company and other companies had no power or right to transfer to the complainant herein the rights, privileges and franchises owned and enjoyed by the Des Moines Street Railroad Company, and other companies; but admits that ever since the 21st day of August, 1893, the complainant has been engaged in maintaining and operating a system of street railways in the streets of the City of Des Moines. Respondent denies that it has recognized the complainant as the assignee and holder of all of the rights, privileges and franchises heretofore referred to, or that it has assented, without objection or protest, to the exercise of the said rights, privileges and franchises.

That as to the allegations in Paragraph 28 of the Bill of Complaint, respondent states that in the case of *Des Moines City Railway Company vs. City of Des Moines*, 90 Iowa, 770, no question was raised as to the ownership of the rights, privileges and franchises granted by the ordinance of 1866 as amended; denies that the ordinance of December 10, 1866, as amended, constitutes and is a contract between the complainant and the respondent, unlimited as to time, and that, by said ordinance, there was vested in the complainant the right to construct, maintain and operate an electric street railway system in the streets and alleys and over bridges of the City of Des Moines, but states that said ordinance granted the right to construct, maintain and operate a street railway system in the streets and alleys and over the bridges of the City of Des Moines for a limited length of time, to-wit: thirty (30) years, and that all of the rights, privileges and franchises obtained under said ordinance expired by limitation, and by the terms of the ordinance, on or about the 1st day of January, 1898; denies the allegations contained in Paragraph 30 of the Bill of Complaint, and states that as to whether or not said allegations are true is immaterial, as in event of their truth, the life of the rights and privileges granted by the ordinance of December 10, 1866, could not thereby be prolonged.

Respondent denies the allegations contained in Paragraph 31; ad-

mits that many thousands of dollars have been expended in the construction, maintenance, equipment and operation of a street railway system and power plant in the City of Des Moines, and that the complainant is now operating about seventy (70) miles of street railway in the city; admits that extensions have been made with the knowledge of said city, but without its acquiescence therein; denies that the respondent has from time to time required or compelled the complainant to make changes in its street railway or to make extensions thereof, or to lay or re-lay any of its tracks, but admits that it has been required to pay portions of the cost of pavement upon streets upon which its lines were located; admits that the complainant and its grantors have always claimed the right to build, extend and operate its street railways upon the streets of said City of Des Moines, but denies that such claim has ever been admitted by the respondent; admits that in order to successfully operate and maintain its street railway system and furnish adequate street railway facilities to the residents of the City of Des Moines, it will be necessary for the complainant, from time to time to extend its present system, but denies that such extension will be made or can be made pursuant to any contract now existing between the complainant and the respondent, and denies that any contract now exists between the complainant and respondent, under and by virtue of which the said complainant is authorized to maintain and operate its present railway system, or to make extensions thereof; that it has no knowledge nor information that the complainant is about to enter upon certain streets of the City of Des Moines for the purpose of laying its tracks thereon.

"Par. 26. That it denies that the City of Des Moines intends to or is about to interfere with any rights of the plaintiff herein, or that it threatens to interfere with any rights which the plaintiff now has. That it admits that on or about the 21st day of November, 1905, the City Council of the City of Des Moines passed the resolution heretofore referred to, and that on or about the 24th day of November, 1905, it caused a copy of such resolution to be furnished to the complainant.

"Par. 27. That this defendant denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff herein unless it shall be declared by some court of competent jurisdiction that the plaintiff has

no right to maintain or operate said system. That it was the intention of the City of Des Moines, in the passage of the resolution heretofore referred to, to simply lay a foundation for the commencement of an action for the purpose of testing the rights of the plaintiff to so maintain and operate its said railway system, and further states that it is the intention of said city to commence an action in equity in the District Court of the State of Iowa, in and for Polk County, it being a court of competent jurisdiction, for the purpose of testing such rights, and that the City of Des Moines has no intention to do otherwise than this, and does not now threaten or never has threatened to interfere with the plaintiff by force, or to attempt to take away or forfeit any rights, privileges or franchises which the plaintiff herein claims to have, except under and by due process of law.

"Par 28. That it is not now and never has been the intention of the City of Des Moines to take or attempt to take from the plaintiff herein any rights which it may have under and by virtue of the ordinances referred to in the bill of complaint, but that the City of Des Moines is simply seeking to have the rights of the plaintiff fully determined by a court of competent jurisdiction to the end that the plaintiff herein may not exercise rights and privileges of which it is not the possessor. That the City of Des Moines is simply seeking to protect and preserve its own rights and the rights of the public by resorting to a court of competent jurisdiction.

"Par. 29. That it admits that the plaintiff herein is engaged in the carrying of United States mail as set forth in the bill of complaint, but denies that such fact can extend, increase or change the rights and privileges of the plaintiff herein to maintain and operate a street railway system, in, upon and along the streets of the City of Des Moines; denies that it is the intention of the City of Des Moines to interfere directly or indirectly with the carrying of such mail; denies that it is the intention of the City of Des Moines to tear up the tracks of the plaintiff.

"Par. 30. That it denies that the plaintiff has a vested property right either by virtue of the said ordinance of December 10, 1866, as amended, or the other ordinances referred to in the bill of complaint.

"Par. 31. That it denies that the adoption of the resolution above

referred to passed on or about the 21st day of November, 1905, and the enforcement of the terms and provisions thereof, are in violation of the Constitution of the United States or of Section 10 of Article 1 thereof, or of Article 14 of the amendments thereto, or that the said resolution or the enforcement thereof will impair the obligation of any contracts which the plaintiff may have with the City of Des Moines, or will cause the taking of the plaintiff's property or property rights without due process of law, but on the contrary, it is the purpose and intent of such resolution that unless the plaintiff shall voluntarily and of its own accord cease the maintenance and operation of its railway system, that then the City of Des Moines will proceed by due process of law to ascertain what rights the plaintiff herein has under and by virtue of the ordinances hereinbefore referred to, and that the City of Des Moines has not now and never has had any intention to do otherwise.

"Par. 32. This defendant further states, that this is a controversy between two citizens of the State of Iowa; that no Federal question is involved, and that this court is without jurisdiction to hear the same.

"WHEREFORE, because of the facts hereinbefore set forth and because this defendant has no intention to do the things complained of in the bill of complaint, and because this defendant is proceeding in all respects in accordance with its rights, and is not interfering or attempting to and never has it threatened to take from the plaintiff any property or property rights without due process of law, this defendant prays that the temporary restraining order heretofore issued in this cause be dissolved, and that the bill of the complainant be dismissed, and that it be allowed to go hence with its costs." (Record, pages 23 to 28, both inclusive.)

That thereafter and on the 3rd day of December, 1906, the respondent, by leave of court first had and obtained, filed an amendment to its answer as follows:

"That in and by the ordinances mentioned in paragraph 3 of the bill, it is agreed that the grantee company, its successors and assigns, shall annually file with the city treasurer a sworn statement or report of the net earnings of said street railway for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made. That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchises and right to maintain and operate its said system of street railways, and are an important part of the conditions upon which said grants were made.

That the said agreements are obligatory upon complainant as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporation named in said ordinances, or of the successors or assigns of said corporations, has at any time during the ten years last past made or filed any statement or report of net earnings as in said ordinance provided.

"That until complainant shall on its part comply with and perform the said terms and conditions of said ordinances, and make and file said statements or reports, it is not entitled to and ought not to receive the aid of this court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded.

"That in and by the ordinances mentioned in paragraphs 12 and 19 of the bill, it is agreed that the grantee company, it successors and assigns, shall annually from and after the year 1897, pay to the city treasurer for the use of the city, five per cent of the net earnings of said railways for the year last past, and that in others of the ordinances of the city and suburban towns mentioned in the bill, like agreements are made to pay to the city or to the city treasurer for its use, a part of the net earnings from said railways. That the said agreements are an important part of the consideration for the grants under which complainant has or claims to have the franchise and right to maintain and operate its said system of street railways and are an important part of the conditions upon which said grants were made.

"That said agreements are obligatory upon complainant as assignee and owner of the contracts and franchises in said ordinances made and granted, but so it is that neither complainant nor any one on its behalf or on behalf of the corporations named in said ordinances or of the successors or assigns of said corporations, has at any time paid or offered to pay to the city or to the city treasurer, any part of said net earnings or any sum agreed to be paid.

"That until complainant shall on its part comply with and perform the terms and conditions of said ordinances, and pay to the city or to the city treasurer for its use, the said portion of net earnings so agreed to be paid, it is not entitled to receive the aid of the court to enforce said ordinances or contracts against this defendant, and is not entitled to the relief demanded."

That the ordinances mentioned in paragraphs 12 and 19 of the bill of complaint provide:

"Cars shall start from both ends of any line as early as six o'clock a. m. and run continuously as late as twelve o'clock, midnight; from six to nine a. m. and from nine o'clock p. m. until midnight, cars shall run at intervals of not more than ten minutes, and from nine o'clock a. m. until nine o'clock p. m. cars shall run at intervals of not more than five minutes."

"A failure to use any track or tracks and run cars thereon as provided, for a period of thirty days, shall be deemed an abandonment of such street or part of street, and the city council may, by resolution, declare such street or part of street abandoned and require said company to remove its tracks from any such street or part of street, and upon failure or refusal of said company to so remove its tracks when notified to do so, the city council may cause the same to be removed at the expense of the company."

That if, as alleged in the bill of complaint, there was a contract between the complainant and the respondent at the time of the passage of the resolution of November 21, 1905, the foregoing provision was a part of such contract; and that for more than thirty (30) days prior to the date when said resolution complained of was passed, the company had failed to use its tracks and run cars on the various lines of such road, as provided in said ordinance.

That by reason of the matters referred to, the respondent had the right, power and authority to pass and enforce the resolution complained of.

(Record, pages 33 and 34.)

To which answer as amended the complainant filed its replication, denying all of the affirmative allegations of the answer of respondent. (Record, page 29.)

Thereafter evidence was submitted on the part of the complainant in support of the allegations of its bill of complaint, and by respondent in denial of such allegations of the bill, and in support of the affirmative allegations in its answer as shown by the record herein.

Thereupon and on the 20th day of February, 1907, the Circuit Court, Hon. Smith McPherson presiding, filed his opinion in said cause. (Record, pages 36 to 45 inclusive.)

Thereafter and on the 22nd day of March, 1907, the Circuit Court, Hon. Smith McPherson presiding, entered a final decree (Record, pages 46 and 47) in which the court finds that the equities of the case are with the complainant and that the complainant has succeeded by purchase to all of the rights under the ordinance of date, December 10, 1866, the said ordinance being one of the city of Des Moines, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the city of Des Moines, Iowa, which said ordinance is set out as Exhibit "A" in com-

plaintiff's bill of complaint, and that the ordinance as subsequently amended and modified, and as ratified and confirmed by the respondent constitutes and is a valid and existing contract between the complainant, its successors and assigns, and the defendant, the respondent, and that the rights vested in the complainant, its successors and assigns by said contract are perpetual, except only as set forth in Section Ten of said ordinance, by which under said section ten the exclusive feature has expired by limitation of time, and the court decrees that except as to said exclusive feature recited in said section ten, of said ordinance, that the rights vested in complainant, its successors and assigns, by said contract are perpetual, that the complainant has also succeeded to the rights and benefits of divers other ordinances granted by the respondent to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company, that the resolution passed by the city council of respondent on November 21, 1905, and set out in paragraph thirty-two of complainant's bill is cancelled, annulled, set aside, the same being in violation of the rights of complainant company under the obligations of said contract, and further ordered that the respondent, its city council, mayor, city solicitor and all officers of said city, and those hereafter officers of said city and each and all of them now holding office, and all servants, agents and employees and all successors in office be and they are hereby perpetually enjoined from enforcing or attempting to enforce said resolution and from in any manner disturbing, impeding or interfering with the free use or comfortable enjoyment by complainant, its successors or assigns, of any rights, privileges and franchises vested in complainant herein, and vested in any corporation or company or person from which complainant by purchase or otherwise has acquired rights and that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of section ten thereof, shall be preserved perpetually to the complainant, its successors and assigns. Any and all controversies now existing or that may hereafter arise between the complainant, its successors or assigns and the City of Des Moines as respect other ordinances than the one of December 10, 1866 and amendments thereto, are not adjudicated by this decree, and all questions relative to such other ordinances are not determined. To each and all of which respondent excepted.

Thereafter on the 9th day of July, 1907, the respondent filed its petition for appeal to this Honorable Court (Record, pages 47 and 48.)

Thereafter and on the 10th day of July, 1907, said petition was granted and appeal allowed.

Thereafter and on the 10th day of July, 1907, the respondent filed its assignment of errors. (Record, pages 48 to 54.)

SPECIFICATION OF ERRORS RELIED ON.

The appellant states that the Circuit Court erred in the following particulars:

1. That the Circuit Court erred in retaining jurisdiction of the case and in ruling and holding that it had jurisdiction thereof.

2. That the Circuit Court erred in ruling and holding that the equities were with complainant and that complainant was entitled to equitable relief.

3. That the Circuit Court erred in finding the equities of the cause to be with the complainant.

4. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," and set out as Exhibit "A" in complainant's complaint, and the amendments thereto, constitute a valid and subsisting contract between the complainant and respondent.

5. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," set out as Exhibit "A" in complainant's complaint, together with the amendments thereto, has for years been construed by the respondent, the City of Des Moines, as granting a perpetual franchise to the complainant.

6. That the Circuit Court erred in holding that the respondent municipality, City of Des Moines, could, by acts or conduct on the part of its officers, in relation to or in connection with the ordinance of December 10, 1866, grant rights by such acts or conduct in addition

to the rights expressly set forth in said ordinance of December 10, 1866.

7. That the Circuit Court erred in holding that the complainant, The Des Moines City Railway Company, could obtain rights or grants not expressly granted in the ordinance of December 10, 1866, by the acts or conduct of the officers of the respondent municipality, the City of Des Moines, in connection with or in relation to said ordinance of December 10, 1866.

8. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, has for years been construed as one granting a perpetual franchise.

9. That the Circuit Court erred in holding that the ordinance of December 10, 1866, has been construed or otherwise treated by the respondent municipality, the City of Des Moines, or its officers, as in force or of any validity after the 1st day of January, 1898.

10. That the Circuit Court erred in holding that the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, creates or constitutes a perpetual grant or contract between complainant and respondent.

11. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," together with the amendments thereto, still exist or are still in force.

12. That the Circuit Court erred in holding and decreeing that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," except as to the exclusive features recited in Section 10 of said ordinance, together with the amendments thereto, are perpetual in the complainant, its successors and assigns.

13. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant, or any of them, under the ordinance of December 10, 1866, as subsequently amended or modified, exist or were in force or effect after January 1, 1898.

14. That the Circuit Court erred in holding that the rights vested in or acquired or held by complainant under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," as subsequently amended or modified, are impaired by the resolution of November 21, 1905, which said resolution is complained of.

15. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violated or impaired any right or rights of complainant.

16. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Section 10 of Article 1 of the Constitution.

17. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, violates or impairs any right secured to complainant under Article 14 of the Amentments to the Constitution of the United States.

18. That the Circuit Court erred in holding that the enforcement and execution of the resolution of November 21, 1905, (which resolution is complained of) by the respondent in this case, deprives the complainant of its property without due process of law, in violation of Article 14 of the Amendments to the Constitution of the United States.

19. That the Circuit Court erred in holding that the resolution complained of, of November 21, 1905, was in violation of the obligation of any contract existing between the complainant and the respondent, and especially in holding that the same was in violation of the ordinance of December 10, 1866, as subsequently amended and modified.

20. The Circuit Court erred in ordering, adjudging and decreeing that the resolution complained of, of November 21, 1905, as set out and contained in paragraph 32 of complainant's bill, be cancelled, annulled, set aside, and held for naught.

21. That the Circuit Court erred in granting an injunction restraining the respondent and its officers from enforcing and executing, or attempting to enforce and execute the resolution of November 21, 1905, set out in paragraph 32 of complainant's bill of complaint.

22. That the Circuit Court erred in granting an injunction restraining respondent and its officers from disturbing, impeding or interfering with the complainant in the enjoyment of the rights and privileges claimed by it under the ordinance of December 10, 1866, entitled, "An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines," as subsequently amended and modified.

23. That the Circuit Court erred in granting an injunction, and ordering, adjudging and decreeing that the respondent, the City of Des Moines, its city council and mayor and city solicitor, and all officers of said city and those hereafter officers of said city, and all servants, agents and employes, and all their successors in office, be enjoined from, in any manner, disturbing, impeding or interfering with the free use and comfortable enjoyment by said Des Moines City Railway Company, its successors or assigns, of any rights, privileges and franchises vested in complainant, and vested in any corporation or company or person from whom complainant, by purchase or otherwise, has acquired rights.

24. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, and all amendments thereto, save and except the exclusive feature of Section 10 thereof, shall be perpetual to the complainant, its successors and assigns.

25. That the Circuit Court erred in granting an injunction, and adjudging and decreeing that the City of Des Moines and its officers, including the City Solicitor, be enjoined from bringing or maintaining an action or actions in court to ascertain and determine the respective rights of complainant and respondent.

26. That the Circuit Court erred in ordering and decreeing that the respondent and its officers be enjoined from bringing or maintaining an action or actions in court to oust complainant from the streets, alleys and public places of the respondent municipality.

27. That the Circuit Court erred in ordering, decreeing and enjoin-

ing the respondent and its officers from bringing or maintaining an action or actions in court to test the rights of complainant to operate street railways in the respondent municipality, the City of Des Moines.

28. That the Circuit Court erred in not defining what rights, privileges and franchises were vested in the complainant under the various ordinances and franchises upon which it based its right to recover in this suit.

29. That the Circuit Court erred in not holding that the rights and privileges acquired and owned by the Des Moines City Railway under the ordinance of December 10, 1866, as subsequently amended and modified, expired on January 1, 1898.

30. That the Circuit Court erred in holding, adjudging and decreeing that the resolution of the city council of the respondent city passed on November 21, 1905, and set out in paragraph 32 of complainant's bill of complaint, was a law.

31. That the Circuit Court erred in holding that the City of Des Moines had the power or authority vested in it to grant a perpetual right or franchise to construct, operate or maintain a street railway over or upon the streets, alleys and public places of the City of Des Moines.

32. That the Circuit Court erred in holding that the respondent, the City of Des Moines, had the power or authority on December 10, 1866, to grant a perpetual right to construct, maintain or operate a street railway upon, over or along the streets, alleys and public places of the City of Des Moines.

33. That the Circuit Court erred in holding that the City of Des Moines was, at any time after December 10, 1866, granted or given the power or authority to grant or pass a franchise or ordinance or make a contract granting or vesting in any person, firm or corporation the right or privilege to construct, maintain or operate a street railway over, upon or along the streets, alleys and public places in the City of Des Moines in perpetuity.

34. That the Circuit Court erred in holding that the City of Des Moines at any time ever granted, ratified or confirmed any grant in perpetuity, to construct, maintain or operate a street railway over,

along or upon the streets, alleys and public places of the City of Des Moines.

35. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right to construct, maintain or operate street railways upon, along or over the streets, alleys and public places of the City of Des Moines under the ordinance of December 10, 1866, as subsequently amended and modified.

36. That the Circuit Court erred in holding, adjudging and decreeing that the complainant has the right and privilege, granted to it by ordinance or otherwise, to construct, maintain or operate street railways upon, over or along the streets, alleys and public places in the City of Des Moines.

37. That the Circuit Court erred in holding, adjudging and decreeing that the ordinance of December 10, 1866, as subsequently amended and modified, was a valid, subsisting contract between the complainant and the respondent, and that thereunder, the complainant had the right to construct, maintain and operate street railways over, along or upon the streets, alleys and public places of the City of Des Moines, which said right exists in perpetuity.

38. That the Circuit Court erred in refusing to determine the rights of complainant under each of the ordinances or franchises declared on its bill of complaint.

39. That the Circuit Court erred in refusing to determine all of the questions at issue as tendered by the allegations of the bill of complaint and the allegations of the respondent's answer.

40. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, or persons, which said several other ordinances are referred to in the bill of complaint of complainant."

41. That the Circuit Court erred in holding that "the Des Moines City Railway Company has also succeeded to the rights and benefits of divers other ordinances granted by the City of Des Moines to divers other corporations, which said several other ordinances are referred to in the bill of complaint of complainant company," without also stating and finding what other corporations and what other ordinances are in-

tended or referred to, and without fixing and determining the rights of the parties under each of said ordinances and franchises.

42. That the Circuit Court erred in enjoining respondent and its officers from disturbing, impeding and interfering with the use and enjoyment by complainant of rights, privileges or franchises under ordinances respecting which controversies existing or hereafter arising are said not to be adjudicated.

43. That the Circuit Court erred in holding that all of complainant's street railways were constructed or operated under authority of the ordinance of December 10, 1866.

44. That the Circuit Court erred in holding that the resolution of November 21, 1905, is a law or legislative act.

45. That the Circuit Court erred in holding that the resolution of November 21, 1905, was an attempt to repeal, amend or modify the ordinance of December 10, 1866, as subsequently amended or modified.

Respondent's position in reference to this case is substantially as follows:

First. That the Circuit Court was without jurisdiction to hear and determine the case.

Second. That there was no showing which entitled the complainant to equitable relief.

Third. That the City of Des Moines was not vested with the power by the legislature of the State of Iowa on December 10, 1866, to grant a franchise for the use of its streets, alleys and public places for street railway purposes.

Fourth. That at the time of the adoption of the ordinance or franchise of December 10, 1866, nor at any subsequent time did the City of Des Moines have the power or authority granted to it by the legislature of the State of Iowa to execute and grant a franchise for the use of its streets, alleys and bridges unlimited as to time or in perpetuity.

Fifth. The franchise or ordinance of December 10, 1866, is not by its terms a grant in perpetuity.

Sixth. That the ordinance or franchise of December 10, 1866, expired by limitation of time as provided by its terms on January 1, 1898.

SEVENTH. That by its conduct the municipality, the City of Des Moines, has not construed the ordinance or franchise of December 10, 1866, as still in force, or as constituting a valid and binding contract in perpetuity in any event, and is not estopped to deny that such ordinance or franchise has expired by limitation of time.

EIGHTH. That the appellee has no right to maintain and operate its street railway system under any franchise granted by the City of Des Moines or any of the municipalities which were incorporated into the City of Des Moines in 1890.

BRIEF ON POINTS INVOLVED.

I.

The United States Circuit Court was without jurisdiction to hear and determine this cause.

1. The question of jurisdiction precedes any inquiry into the merits.

Oregon vs. Hitchcock, 202. U S., 60-68;
Whitney vs. Dick, 202 U. S., 132-135.

2. The question of jurisdiction was clearly raised and decided in the court below (record page 28-36), and while not referred to in the assignment of errors (record page 48), is, notwithstanding, before this court, and would be even if it had not been suggested in the court below.

Act of March 3rd, 1875, Sec. 5;
Briggs vs. Traders Company, 135 Fed. R., 254-257;
Hartog vs. Memory, 116 U. S., 588-590;
Williams vs. Nottawa, 104 U. S., 209-211.

3. Whether a case presents a Federal question must be determined from the allegations of fact in the bill, giving them their natural and logical meaning and application, without regard to the arguments, conclusions and surmises stated.

Devine vs. Los Angeles, 202 U. S., 313-333;
Houston and T. C. R. Co., vs. Texas, 177 U. S., 66-78;
St. Joseph & G. I. R. Co. vs. Steele, 167 U. S., 659-662;
Chappell vs. Waterworth, 155 U. S., 102-108;

Arkansas vs. Kansas & T. Coal Co., 183 U. S., 185-188;
Western Union Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., 243;
Hamblin vs. Western Land Co., 147 U. S., 531-532;
Galveston & S. A. R. Co. vs. State of Texas, 170 U. S., 226-236;
Simpkins Suit in Equity, p. 95.

4. If it appears from the entire record that a case does not really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court, jurisdiction must be denied.

Act of March 3rd, 1875, Sec. 5;
Williams vs. Nottawa, 104, U. S., 209-212;
Morris vs. Gilmore, 129 U. S., 315;
Wetmore vs. Rymer, 169 U. S., 115-120;
Barrie vs. Edmunds, 116 U. S., 550;
Deputron vs. Young, 134 U. S., 241;
Simon vs. House, 46 Fed. R., 317;
Maxwell vs. A. T. & S. F. R. Co., 34 Fed. R., 286;
Holden vs. Utah M. & M. Co., 82, Fed. R., 209;
Bank of Arapahoe vs. David Bradley & Co., 72 Fed. R. 867;

5. The resolution of the City Council of Des Moines of November 21st, 1905, (record page 15) does not infringe the provisions of Section 10, Article One of the Constitution, to-wit:

"No state shall pass any law impairing the obligations of contracts."

a. The prohibition of Section 10, Article One, of the Constitution is aimed at the legislative power of the State, and to come within its inhibition there must be a law of the State or an enactment from some source to which the State gives the force of law.

New Orleans Water Co. vs. Louisiana Sugar Co., 125 U. S., 18-32-38;
Iron Mountain Ry. Co. vs. Memphis, 96 Fed. R., 113;
Williams vs. Bruffy, 96 U. S., 176-183;
Lehigh Water Company vs. Easton, 121 U. S., 388-392;

b. If an enactment is susceptible of two meanings, one in conflict with the Constitution and the other not, the Court should adopt the latter.

State vs. Stevens, 112 Wis., 170;
Wheeler vs. Herbert, 92 Pac., (Cal.) 353, 358;
Munn vs. Ill., 94 U. S., 113-123;
C. & N. W. Ry. Co. vs. Dey, 35 Fed. R., 866-874;
Fletcher vs. Peck, 6 Cranch, 87-128;
Sweet vs. Rechel, 159 U. S., 393;
United States vs. Boyer, 85 Fed. R., 430;
Thorn vs. San Francisco, 4 Cal., 159.

c. The resolution is not a law.

Code of Iowa, 1897, Sec. 680:

"Municipal corporations shall have power to make and publish from time to time ordinances not inconsistent with the laws of the state for carrying into effect and discharging the powers and duties conferred by this Title * * * *."

Cascaden vs. Waterloo, 106 Iowa, 673, 681, 682;
Martin vs. Oskaloosa, 126 Iowa, 680-685;
Shelby vs. Burlington, 125 Iowa, 343;
Jones vs. McAlpine, 64, Ala., 512;
Blanchard vs. Bussell, 11 Ohio State, 96-103;
City vs. Sears, 2nd Colo., 588;
Am. & Eng. Ency. Law, 2nd, Ed., Vol 21, p. 947;
Chicago Ry. Co. vs. Chicago, 174 Ill., 439;
San Antonio vs. Mickeljohn, 89 Tex., 79;
People vs. Mount, 186 Ill., 560-571;
Cape Girardeau vs. Foufeu, 30 Mo. App., 511-556;
Fairchild vs. St. Paul, 49 N. W., 325;
State vs. Bayonne, 35 N. J. Law, 335;
McQuillin Municipal Ordinances, Sec. 2;
Dillon on Municipal Corporations, 4 Ed., 236;
Eckert vs. Walnut, 117 Iowa, 629;
Zalesky vs. Cedar Rapids, 118 Iowa, 774.

d. The resolution was not enacted in the manner required for the enactment of an ordinance, and therefore, cannot be construed to be an ordinance.

Code of Iowa, 1897, Sec. 681:

"No ordinance shall contain more than one subject, which shall be clearly expressed in its title, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

Code of Iowa, 1897, Sec. 682:

"Ordinance of a general or permanent nature and those for the appropriation of money shall be fully and distinctly read on three different days, unless three-fourths of the Council shall dispense with the rule."

Cape Girardeau vs. Foufeu, 30 Mo. App., 511-556;

City of Alma vs. Guaranty Savings Bank, 19 U. S. App., 622-628;

State vs. Bayenne, 35 N. J. Law, 235;

Iron Mountain Ry. vs. Memphis, 96 Fed. R., 113;

Dillon on Municipal Corporations, 4 Ed., 436;

McQuillin Municipal Ordinances, Sec. 2;

Strohm vs. Iowa City, 47 Iowa, 42.

e. The contract of the complainant, if it has one, is set forth in the ordinance, and an ordinance cannot be amended or repealed except by an ordinance, and the resolution is therefore void as a matter of state law.

Code of Iowa, 1897, Sec. 681; (Quoted above.)

Cascaden vs. Waterloo, 106 Iowa, 673-681-682;

People vs. Mount, 186 Ill., 560-571.

f. If the effect of the resolution would be to impair the obligation of contracts, or to deny due process of law or equal protection of law, it contravenes the Constitution of Iowa and is void as a matter of state law.

Constitution of Iowa, Art. 1, Sec. 21:

"No * * * * * law impairing the obligation of contracts shall ever be passed."

Constitution of Iowa, Art. 1, Sec. 9:

" * * * * * No person shall be deprived of life, liberty or property without due process of law."

g. If an attempt to legislate is void under the state law no Federal question arises under it for it is not a law.

Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-266;
Munway vs. Charleston, 96 U. S., 432-440;
Williams vs. Bruffy, 96 U. S., 176-183;
Lehigh Water Company vs. Easton, 121 U. S., 388-392;
New Orleans Water Works vs. La. Sugar Co., 125 U. S., 31-38;
Shreveport vs. Cole, 129 U. S., 36.

h. The resolution was not a legislative act, but was passed for administrative and executive purposes only.

Testimony of W. H. Brenner, Record, p. 364-365-366;
Answer, Pars. 26-27-28-29-31; Record p. 26-27-28;
Cumberland vs. Evansville, 77 Ind., 542-550-551;
St. Paul Gas Light Company vs. St. Paul, 181 U. S., 142;
Cape May vs. Cape May D. B. & S. P. Ry. Co., 60 N. J. Law. 224; 39 L. R. A., 609; 37 At. R., 892.

6. The resolution of November 21, 1905 (record p. 15) does not infringe the provisions of Sec. 1 of the 14th Amendment to the Constitution of the United States relating to due process of law.

a. Law in its regular course of administration is due process and when secured by the law of the state the constitutional requirement is satisfied.

2nd Kent Com., 13;
Davidson vs. New Orleans, 96 U. S., 97;
Hurtado vs. People, 110 U. S., 516;
Hager vs. Reclamation District, 111 U. S., 701;
Merchant vs. Railroad Company, 153 U. S., 280;
Leidley vs. Land Company, 159 U. S., 103;
Orient Insurance Co., vs. Daggs, 176 U. S., 557;
Caldwell vs. Texas, 137 U. S., 692-697;
Lepper vs. Texas, 139 U. S., 462, 468.

b. The resolution shows that the City only intended to proceed by due process of law.

Cape May vs. Cape May D. B. & S. P. Co., 60 N. J. Law, 224; 39 L. R. A., 609; 37 At. R., 892;

c. The intention of the Council in passing the resolution was to cause proceedings to be instituted in a Court of competent jurisdiction.

Answer, par. 27-28, Record p. 27;
Exhibit D, Record p. 362;
Testimony of W. H. Bremner, Record, p. 364-365-366;
Sec. 35, Ordinance No. 097 of the City of Des Moines, Record p. 399.

II.

The complainant below was not entitled to equitable relief.

1. Danger of judicial proceedings is not an injury justifying an injunction.

High on Injunctions, Vol. 1, Sec. 64;
Wolf vs. Burke, 56 N. Y., 116;
Wallace vs. Society, 67 N. Y., 23;
Cape May vs. Cape May D. B. & S. P. R. Co., 60 N. J. Law, 224; 39 L. R. A., 609; 37 At. R., 892;
Detroit vs. Detroit City Ry. Co., 56 Fed. R., 867-898.

2. The complainant below having secured passage of the resolution of which complaint is made, is not entitled to relief.

Testimony of W. H. Bremner, Record p. 366-367-368.

3. The complainant below was not entitled to equitable relief, because the allegations of the bill are denied by the answer and are not sustained by the evidence.

III.

Municipalities in Iowa have not the power to grant to a street railway the right to occupy streets in perpetuity.

1. Cities have no inherent jurisdiction to make laws or regulations of government. They are governments of enumerated powers acting by delegated authority.

Clark vs. City of Des Moines, 19 Iowa, 199-212-214;
City of Keokuk vs. Scroggs, 39 Iowa, 447-450;
Brockman vs. Creston, 79 Iowa, 599;

Becker vs. Water Works Company, 79 Iowa, 422;
Aldrich vs. Payne, 106 Iowa, 461-7.

2. A municipality has not inherent power to authorize a street railway company to lay tracks on its streets, but must have express authority therefor. Streets and highways are under the exclusive control of the legislature.

Dillon on Municipal Corporations, Secs. 716-717;
Davis vs. New York, 14 N. Y., 514-517;
Milhau vs. Sharp, 27 N. Y., 611-619-622;
Coleman vs. Second Avenue Ry. Co., 38 N. Y., 201;
Potter vs. Collins, 156 N. Y., 16; 50 N. E., 413-15;
Covington Street Ry. Co. vs. City of Covington, 9 Busch 127, (Ky.)
Chicago vs. Evans, 24 Ill., 52;
Peoples Railroad Co. vs. Central Ry Co., 51 Cal., 583;
Atlantic R. R. Co. vs. St. Louis, 66 Mo., 228;
Denver Street Ry. Co. vs. Denver, 2nd Colo., 673;
Govin vs. Chicago, 132 Fed. R., 848-854;
Stanley vs. City of Davenport, 44 Iowa, 463-468;
Sears vs. Marshalltown Street Ry. Co., 65 Iowa, 742-743;
Dickinson County vs. Faus, 112 Iowa, 21-23.

3. A municipality under a grant of power to lay off, open, widen, straighten or to narrow or to vacate, or to extend, improve or keep in order and repair streets, does not have the power to authorize the construction of a street railway.

Davis vs. Mayor of New York, 14 N. Y., 514-517;
Stanley vs. City of Davenport, 54 Iowa, 463-67-68;
Detroit Citizens Street Ry Co. vs. City of Detroit, 64 Fed. R., 628-635;
Peoples Railroad Co. vs. Memphis R. R. Co., 10 Wallace, 38;
Govin vs. City of Chicago, 132 Fed. R., 848-854.

4. In 1866 the City of Des Moines had no power to authorize the construction of a street railway on its streets, the only power possessed by it in reference to streets being given by Sec. 1064 of the Revision of 1860.

Revision of 1860, Sec. 1064:

"They (cities) shall have power to lay off, open, widen, straighten, or to narrow or vacate or to extend and establish, to improve or keep in order and repair, and to light streets, alleys * * *"

5. In 1873 the legislature of Iowa granted to municipalities the power to authorize or forbid the laying down of street railway tracks.

Code 1873, Sec. 464:

"They (cities) shall also have the power to authorize or forbid the location and laying down of tracks or railways and street railways on all streets, alleys and public places."

6. In 1874 the City of Des Moines ratified the ordinance of December 10th, 1866.

Record, p. 637;

Des Moines Street R. R. Co. vs. Broad Guage Street Ry. Co., 73 Iowa, 513;

7. A municipality cannot grant an exclusive or perpetual right to lay down and operate street railways over its streets unless it is so authorized and empowered by the legislature by a grant in specific and explicit terms. Authority to authorize or prohibit the use of streets by a street railway is not sufficient.

Davis vs. New York, 14 N. Y., 514;
Milhau vs. Sharp, 27 N. Y., 611-19-22-23;
Railway Company vs. Mayor of New York, 4 N. Y., 406;
Louisville City Ry. Co. vs. Louisville, 8 Busch (Ky.) 415;
Eickles vs. Railway Company, 78 Ind., 261;
State vs. Trenton, 36 N. J. Law, 79;
Nash vs. Lowrey, 37 Minn., 263; 33 N. W., 787;
Long vs. City of Duluth, 51 N. W., 913-14;
State vs. Minnesota Thresher Co., 83 N. W., 32-35;
Brenham vs. Brenham Water Co., 4 S. W., (Tex.) 143-152;
Thrift vs. Elizabeth City, 30 S. E. (S. C.) 349;
Lake Roland Ry Co. vs. Mayor of Baltimore, 26 At. R., 510;
Penn. R. R. Co. vs. Canal Commissioners, 21 Pa. State, 9-22;
Logan & Son vs. Pyne, 43 Iowa, 524-25;
Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-241;

State vs. Cincinnati Gas Light Company, 18 O. State, 294-295-296;

Jackson County Horse Car Co. vs. Interstate R. T. Co., 24 Fed. R., 306-7-8;

Saginaw Gas Light Company vs. Saginaw, 28 Fed. R., 529-34;

Grand Rapids E. E. L. Co. vs. Grand Rapids, 33 Fed. R., 659;

Citizens Street Ry. Co. vs. City Ry. Co., 64 Fed R., 627-635;

Logansport Ry. vs. City of Logansport, 114 Fed. R., 688;

Cleveland Electric Ry. vs. City of Cleveland, 137 Fed. R., 111-122-23;

Wright vs. Nagle, 101 U. S., 791-6;

Ottawa vs. Carey, 108 U. S., 110-122;

Citizens Street Ry. Co. vs. Detroit Street Ry. Co., 171 U. S., 48-53-54;

Minturn vs. La Rue, 23 Howard, 435;

Railway Co. vs. Philadelphia, 101 U. S., 528-39;

Cooley on Constitutional Limitations, 7 Ed., 296;

Dillon on Municipal Corporations, 4 Ed., Sec. 91, 715-716;

Home Telephone and Telegraph Co. vs. Los Angeles, Decided Nov. 30, 1908, by U. S. Supreme Court.

8. The policy of the state of Iowa has always been to prohibit the granting of franchises or special rights or privileges in perpetuity.

Constitution of Iowa, Sec. 12, Art. 8.

"Subject to the provisions of this Article the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, * * * and no exclusive privileges, except as in this Article provided, shall ever be granted."

Sec. 1090, Code 1873, now Sec. 1610, Code 1897:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good."

Mayor of Houston vs Houston City Ry. Co., 19 S. W., 127-129;
Nash vs. Lowrey, 33 N. W., (Minn.) 787-8;
Flynn vs. Little Falls E. & N. Co., 77 N. W. (Minn.) 38-39;
Sioux City Ry. Co. vs. Sioux City, 78 Iowa, 742;
Sioux City Ry. Co. vs. Sioux City, 78 Iowa, 364;
City of Des Moines vs. Des Moines Water Works Co., 95 Iowa, 348;
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 234-241;
Thrift vs. Elizabeth City, 122 N. C., 31; 44 L. R. A., 427-9;
Grand Rapids E. E. L. Co. vs. Grand Rapids, 33 Fed. R., 659-672;
Detroit Citizens Street Ry. vs. City of Detroit, 64 Fed. R., 628-37-41;
Logansport Street Ry. Co. vs. Logansport, 114 Fed. R., 688-93;
Turnpike Co. vs. Illinois, 96 U. S. 63-68;
Railway Company vs. Philadelphia, 101 U. S. 528;
Sioux City Ry. vs. Sioux City, 138 U. S., 98-107-108;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-70;
Schurtz vs. Cook, 148 U. S., 410;
N. Y. & N. E. Ry. vs. Bristol, 151 U. S., 556;
Shields vs. Ohio, 95 U. S., 319-324.

IV.

The ordinance of 1866, by its terms limits the life of the grant to thirty years from the time the first mile of track was laid and in use.

1. Section one of the ordinance grants authority to maintain and operate the railway, "for the time and upon the conditions hereinafter mentioned." (Exhibit A, Record p. 18.) The only time thereafter mentioned in the ordinance is found in Sec. 10 thereof, which provides, "The right herein granted to said Company shall be exclusive for thirty years from the time the first mile of track is laid and cars running thereon." (Sec. 1, Exhibit A, Record p. 18; Sec. 10, Exhibt A, Record p. 20.)

2. The first mile of track was laid and in use January 1, 1868, and the thirty-year period expired January 1st, 1898.

Testimony of M. P. Turner, Record p. 459.
Opinion of the Court, Record p. 38.

3. In construing grants from the public the rule is that nothing passes by implication, and if the contract or grant is ambiguous or doubtful the construction is against the grantee and in favor of the public.

Charles River Bridge vs. Warren Bridge, 11 Peters, 420;
Dillon on Municipal Corporations, 4 Ed., Sec. 91;
Oregon R. & N. Co. vs. Oregonian R., 130 U. S., 1-26;
Blair vs. Chicago, 201 U. S., 400-463-471-2-3;
Perrine vs. Chesepeake Canal Co., 9 Howard, 172-192;
Henry vs. Mason City & F. D. R. R. Co., 118 N. W., 310-11;
Dubuque R. R. vs. Litchfield, 23 Howard, 66-88;
Turnpike Co. vs. Illinois, 96 U. S., 63;
Fertilizing Co. vs. Hyde Park, 97 U. S., 659-666;
Slidell vs. Grand Jean, 111 U. S., 412-438;
Coosaw Mining Co., vs. S. C., 144 U. S., 500;
Metropolitan Street Ry. Co. vs. Bd. of Tax Com., 199 U. S., 1-36
Knoxville Water Co. vs. Knoxville, 200 U. S., 22-23;
Clark, Dodge & Co. vs. Davenport, 14 Iowa, 494-500;
Logan & Son vs. Pyne, 43 Iowa, 424-5;
Keokuk Water Co. vs. Keokuk, 80 Iowa, 137;
Aldrich vs. Paine, 106 Iowa, 461-7;
Lacey vs. Davis, 112 Iowa, 106-9;
Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-241;
Richmond County Gas Light Co. vs. Middleton, 59 N. Y., 228;
Syracuse Water Company vs. Syracuse, 116 N. Y., 167;
Parkhurst vs. City, 32 Pa., 304;
Birmingham Ry. vs. Birmingham, 79 Ala., 468;
Long vs. City of Duluth, 51 N. W., 913-14;
Penn. Ry. vs. Canal Commissioners, 21 Pa., 22;
The Binghampton Bridge, 3 Wallace, 51-75;
Minturn vs. La Rue, 23 Howard, 433-6;
Jackson County H. Ry. Co. vs. Interstate R. T. Co., 24 Fed. R., 306-7-8;

Saginaw Light Co. vs. Saginaw, 28 Fed. R., 528-539;
Omaha Ry. Co. vs. Cable Tramway Co., 30 Fed. R., 324-8;
Grand Rapids R T. Co. vs. Grand Rapids E. L. Co., 33 Fed. R., 659-667;
Rice vs. Railroad Co., 1st Black. (U. S.) 358-379-80;
Turnpike Co. vs. Illinois, 96 U. S., 63-68;
Wright vs. Nagle, 101 U. S., 791;
Hannibal R. R. Co. vs. Packet Co., 125 U. S., 260-271;
Central Transportation Co. vs. Pullman Car Co., 139 U. S., 24-49;
Stein vs. Bienville Water Co., 141 U. S., 67-80-81;
Water, Light & Gas Co. vs. City of Hutchinson, 207 U. S., 385-393;
Dillon on Municipal Corporations, 4 Ed., Secs. 89-91.

4. In construing a statute or ordinance, if two constructions are possible, one of which will render the enactment void while the other will sustain it, the latter will be adopted.

Santo vs. State, 2nd Iowa, 165-208;
Manson vs. Springer, 15 Iowa, 304;
Stewart vs. Board of Supervisors, 30 Iowa, 9;
State vs. Forkner, 94 Iowa, 733;
McGuire vs. Railway Company, 131 Iowa, 340.
State vs. Anson, 112 N. W., 475 (Wis.).

5. To adopt the construction that the ordinance of 1866 granted a right in perpetuity would render the contract void.

See Division III, supra.

6. If by its terms the ordinance of 1866 expired January 1st, 1898, no acts of the City Council of the City of Des Moines or of the Street Railway Company subsequent thereto could serve to extend it.

Code of Iowa, 1897, Sec. 775:

"Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires and the poles and other supports thereof * * *."

Code of Iowa, 1897, Sec. 776:

"No franchise shall be granted, renewed or extended by any

city or town for the use of its streets, highways, avenues, alleys, or public places, for any of the purposes named in the preceding section unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election."

Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 233-255;

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., 327;

Grand Rapids Bridge Co. vs. Prange, 24 Am. Rep., 585 (Mich.).

Detroit vs. Detroit Street Railway Co., 60 Fed. R., 161-164-175;

Citizens Street Ry. Co. vs. City Ry. Co., 64 Fed. R., 647-652-653.

7. The meaning of the ordinance must be gathered from the law itself and not from contemporaneous statements of the individuals who framed it or those who voted for it.

McQuillin Municipal Ordinances, Par. 292;

Ah Kow vs. Nunan, 5 Sawyer, 552-560-561;

Blair vs. Chicago, 201 U. S., 400.

V.

The appellee can claim no rights under the franchises granted by the City of Des Moines other than the ordinance of 1866.

1. The failure to comply with the terms of a franchise will constitute an abandonment thereof.

City of Tower vs. Tower City Ry. Co., 71 N. W., 691-2-3. (Minn.)

United States vs. Repentigny, 72 U. S., (3 Wall.) 217-67-68;

Shellenberg vs. Harriman, 88 U. S., (21 Wall.) 44-63-64;

Farnsworth vs. M. & P. Ry. Co., 92 U. S., 49-66-67-68;

Township of Plymouth vs. Chestnut Hill Ry. Co., 32 At. R. 19-20 (Pa.).

2. Non user coupled with intention to abandon will constitute an abandonment.

Henderson vs. Central Passenger Ry. Co., 21 Fed., 357-68-69;

Louisville Trust Co. vs. Cincinnati, 76 Fed., 296-315;

Wright vs. Milwaukee E. Ry. Co., 69 N. W., 791-4 (Wis);

People vs. Broadway Ry. Co., 26 N. E., 961-3-4-5-6;

Welsh vs. Taylor, 31 N. E., 896-8;
Hazzader vs. Carroll, 76 Fed., 474-5.

3. The franchise granted to the Des Moines Broad Guage Railroad Company requires it to pay into the city treasury five per cent of the net earnings after ten years from the date of the grant. This payment has never been made.

Sec. 21, Exhibit 57, Record p. 144;
Testimony of G. B. Hippee, Record p. 615.

4. The franchise granted the Des Moines Broad Guage Railroad Company also requires that it obtain permission of the City Council before laying tracks on streets other than those mentioned in the ordinance. This has not been complied with.

Sec. 3, Exhibit 57, Record p. 140;
Testimony of G. B. Hippee, Record p. 615.

5. The franchise granted to the Des Moines River Line Street Railway Company requires it to pay five per cent of its net earnings to the city after the expiration of ten years from the date of the grant. This payment has never been made.

Exhibit 135, Sec. 21, Record p. 266;
Testimony of G. B. Hippee, Record p. 615.

6. The franchise granted to the Des Moines River Line Street Railway Company authorizes the use of steam only as a motive power.

Sec. 2 of Exhibit No. 135, Record p. 261.

7. The franchise granted the Des Moines Belt Line Railway Company authorizes the use of steam and electric motor only as a motive power.

Sec. 5, Exhibit 125, Record p. 244.

8. The franchise granted to the Des Moines & Sevastapol Railway authorizes the use of animal power only as a motive power.

Sec. 2, Exhibit 91, Record p. 202.

9. The Des Moines City Railway Company operates its cars by means of electricity supplied from an overhead wire.

Testimony of G. B. Hippee, Record p. 541.

10. The franchise granted to the Des Moines Rapid Transit Company contains no words of succession.

Sec. 1, Exhibit 112, Record p. 225;
Sec. 1, Exhibit 114, Record p. 227,

11. A franchise containing no words of succession or assignment cannot be sold or transferred.

Thomas vs. Railroad Company, 101 U. S., 71;
Penn. Ry. vs. St. Louis Ry. Co., 118, U. S., 290-300;
Oregon Ry. vs. Oegonian Ry. & Navigation Co., 130 U. S., p. 1;
Central Transportation Company vs. Pullman Company, 139 U. S., 24-48.

VI.

The appellee can claim no rights under the franchises granted by the suburban towns which were annexed to Des Moines in 1890.

1. Upon the incorporation of the suburban towns into the city of Des Moines all the franchises and contracts granted by them terminated.

People vs. Chicago Telephone Co., 77 N. W., 245;
Blair vs. Chicago, 201 U. S., 400-487.

2. Many of the franchises granted by the suburban towns contain no words of succession or assignment, and could not be transferred.

Division V, sub-division 11, supra.

VII.

The appellant is not estopped from questioning the right of the appellee to occupy its streets.

1. To be available matters in estoppel must be especially pleaded.

Golden vs. Hardesty, 93 Iowa, 622;
First National Bank vs. Zims, 93 Iowa, 140;
Jackson vs. Linn, 94 Iowa, 140;
Nicholas vs. C. R. I. & P. Ry. Co., 90 Iowa, 85;
Spencer Company vs. Papach, 103 Iowa., 513;
Cloud vs. Malvin, 75 N. W., 645.

2. A street railway in possession of streets after the expiration of its franchise is a mere tresspasser.

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., p. 327;
Cedar Rapids Water Company vs. Cedar Rapids, 91 N. W., 1081; 118 Iowa, 234-249;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-270.

3. The fact that the company has made expenditures since the expiration of its franchise and that the value of the property will be affected by the forfeiture is immaterial.

Cedar Rapids Water Company vs. Cedar Rapids, 118 Iowa, 234-255;
Hamilton Gas Light Company vs. Hamilton, 146 U. S., 258-269-270;
Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E. 327;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161-164-175.

4. Expenditures in improvements after the expiration of the franchise will not operate as a renewal thereof.

Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E., 327;
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa, 235-249;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161-164-175.

5. The City Council or other officers of the City of Des Moines could not by their acts estop the city from questioning the rights of the Street Railway Company, since to grant, renew or extend a franchise of this kind requires the consent of the electors.

Code of Iowa, 1897, Secs. 775-776, heretofore quoted.
Cincinnati Inclined Plane Co. vs. Cincinnati, 44 N. E. 327;
Detroit vs. Detroit Street Ry. Co., 60 Fed. R., 161-164.

6. To constitute an estoppel or waiver the acts of the officers relied on must have been within the scope of their authority and power.

Cedar Rapids Water Company vs. Cedar Rapids, 91 N. W., 1081-1088; 118 Iowa, 239-254;
Detroit vs. Detroit Street Ry. Co., 60 Fed. R., 161-164;
Rhinehart vs. Redfield, 87 N. Y. S., 789-799-702;
Smith vs. Town of Westerly, R. I., 35 At. 526;

Seager vs. Mueller (*Ill.*) 24 N. W., 513-514;
Nealy vs. Hagerstown (*Md.*) 48 At., 746;
Driscoll vs. New Haven, (*Conn.*), 52 At., 618-19-20;
Penn. R. R. Co. vs. Hamilton Township, (*N. J.*), 51 At., 926-7;
Snyder vs. City of Mt. Pulaski, 52 N. E., 62-63;
City vs. Minnesota Transfer Co., 83 N. W., 32-35;
Noel Young Bond & Stock Co. vs. Mitchell County, 54 S. W., 284-8.
Unionville vs. Morton, 68 S. W., 605-608. (Mo.)
Wormstead vs. Linn, 68 N. E., 841-2-3. (Mass.)
Marsh vs. Fulton Co., 10 Wall., 676;
City of Lancaster vs. Miller, 51 N. E., 54;
Detroit vs. Detroit City Ry. Co., 60 Fed. R., 161;
Forest vs. St. Frances Levee Dist., 77 Fed. R., 555-561.

ARGUMENT.

I.

JURISDICTION.

The United States Circuit Court was without jurisdiction to try and determine the case at bar.

The question of jurisdiction preceeds any inquiry into the merits.

Oregon vs. Hitchcock, 202 U. S., 60-68;
Whitney vs. Dick, 202 U. S., 132-135.

In the bill, jurisdiction is claimed because the resolution impairs the obligation of complainant's contract, and because the acts complained of do and will deprive complainant of its property without due process of law. (Record p. 17.) This is controverted in the answer where jurisdiction is expressly denied. (Record p. 28.) In the opinion filed it was held that the Circuit Court had jurisdiction. (Record p. 36.) The question was clearly raised and decided in the Circuit Court, and while not referred to in the assignment of errors, (Record p. 48) the question is nevertheless before the Supreme Court even if it had not been suggested in the court below.

Act of March 3, 1875, Sec. 5;
Briggs vs. Traders Co., 135 Fed., 254, 257;

Hartog vs. Memory, 116 U. S., 588, 590;
Williams vs. Nottawa, 101 U. S., 209, 211.

In *Devine vs. Los Angeles*, 202 U. S., 313-333, it was said:

"There being no diversity of citizenship, the jurisdiction of the Circuit Court could only be maintained upon the ground that the suit arose under the Constitution or laws or treaties of the United States, and a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or some law or treaty of the United States, upon the determination of which the result depends. And this must appear from the plaintiff's statement of his own claim, and cannot be aided by allegations as to the defenses which might be interposed." It is further said, page 337: "The questions as to the nature and extent of complainant's titles or rights, as put forward in the bill, are not Federal questions, but are questions of state or general law," citing *San Francisco vs. Scott*, 111 U. S., 768; *Powder Works vs. Davis*, 151 U. S., 389; *Hooker vs. Los Angeles*, 188 U. S., 314. And on p. 338, it is held that the allegations in the answer may be regarded in determining jurisdiction.

In the case at bar, the Court can retain jurisdiction only upon the direct allegations of fact in the bill, and must give them their natural and logical meaning and application, without regarding the arguments, conclusions and surmises stated, and will not retain jurisdiction merely because of a controversy over the existence, nature and extent of the rights, privileges and franchises claimed.

It is claimed by the complainant that the resoution complained of impairs the obligation of its contracts, and will deprive it of its property without due process of law, and denies the equal protection of the law. If these claims are true, then the resolution is within the prohibition of the Federal Constitution and there is a Federal question in the case.

On the other hand, it is contended by the defendant that the resolution is not a legislative act, is not an enactment to which the state has given the force of law, is an administrative or executive act only, and that its only purpose is to authorize the prosecution of proceedings in court to determine the respective rights of complainant and defend-

ant. If these claims are true, then the matters complained of, are not within the prohibition of the Federal Constitution and there is no Federal question in the case.

In construing the resolution for the purpose of ascertaining whether the record presents a Federal question, if it is found that the enactment is susceptible of two meanings, one in conflict with the Constitution and the other not in conflict, the court ought to adopt the latter, especially when it appears that that was the meaning intended by the defendant. The following cases state the rule which should be followed in determining whether the resolution, if regarded as a law of the state, will be held to violate the constitutional guarantees.

"The rule of all courts is that a statute will be declared unconstitutional only when it is shown beyond reasonable doubt that it conflicts with the fundamental law. It is equally true that the courts will seek every reasonable mode of reconciliation of the statute with the constitution and it is only when reconciliation has been found impossible that it will be declared void."

State vs. Stevens, 112 Wis., 170;

quoted and approved in:

Wheeler vs. Herbert, 92 Pac. (Cal.) 353, 358.

In *Munn vs. Illinois*, 94 U. S., 113, Chief Justice Waite said, p. 123: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

In *C. & N. W. Ry. Co. vs. Dey*, 35 Fed. R., 866, Judge Brewer said, p. 874: "It is elemental that a law will not be declared unconstitutional unless the vice is obvious. As was said by Chief Justice Waite in the Munn case: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.'" Or, as has been elsewhere epigrammatically said: 'A doubt sustained the law.'"

That the resolution complained of does not impair the obligation of complainant's contract.

1st. Because it was not enacted in the form or manner provided

by the statute of the state and is therefore void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

2nd. Because it was an attempt to amend or repeal an ordinance by a resolution and is therefore void as a matter of state law and is not a law of the state or an enactment to which the state has given the force of law.

3rd. Because if the effect of the resolution would be to impair the obligation of contracts or to deny due process of law or equal protection of law, it is in contravention of the Constitution of Iowa and void as a matter of state law.

4th. Because the resolution was not a legislative act, but was passed for administration or executive purposes only.

FIRST. That the resolution complained of does not impair the obligation of complainant's contract because it was not enacted in the form or manner provided by the statutes of the state, and is, therefore, void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

The provision of the constitution which it is claimed was infringed provides: Art. I, Sec. 10, "No state shall pass any law impairing the obligation of contracts."

It has been repeatedly decided by this court that to come within the constitutional inhibition there must be a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

Williams vs. Bruffy, 96 U. S., 176, 183;
Lehigh Water Co. vs. Easton, 121 U. S., 388, 392;
N. O. Water Co. vs. Louisiana Sugar Co., 125 U. S., 18, 31, 38.

In *N. O. Water Co. vs. Louisiana Sugar Co.*, 125 U. S., 18, it is held that the inhibition is aimed at the legislative power of the state and not at the decisions of its courts or the acts of its adminisrative or executive officers.

In *Iron Mountain R. Co. vs. Memphis*, 96 Fed., 113, 126, Judge Taft for the Circuit Court of Appeals, said: "If such ordinancee is ad-

ministrative rather than legislative, then it is not within the constitutional inhibition, even if it impairs the obligation of a contract."

Another rule announced in the decisions of this court is that although the city may have had authority to legislate upon the subject, if the attempt to legislate is void for want of conformity to the provisions of the state law, no Federal question arises under it, for it is not a law; thus in *Hamilton Gas Light Co. vs. Hamilton*, 146 U. S., 258, 266, the court said: "The jurisdiction of this court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by ordinance to which the state has not in any form given or attempted to give the force of law. A municipal ordinance not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against laws impairing the obligation of contracts: *Muncay vs. Charleston*, 96 U. S., 432, 440; *Williams vs. Bruffy*, 96 U. S., 176, 183; *Lehigh Water Co. vs. Easton*, 121 U. S., 388, 392; *N. O. Water Works vs. Louisana Sugar Co.*, 125 U. S., 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States."

And in *Shreveport vs. Cole*, 129 U. S., 36 it was held that where the action of a municipality was not authorized by the laws of the state, it was not within the prohibition of the contract clause of the Constitution.

It becomes necessary therefore to ascertain whether there is in this case, in the resolution complained of, a law of the state or an enactment authorized by law or to which the state has given the force of law.

The resolution complained of reads as follows, record p. 362, 363:

"WHEREAS, Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Co. to maintain their tracks and to operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines, and

"WHEREAS, It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible;

"Be It Resolved, By the City Council of the City of Des Moines, that said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement, where paved, of all the streets along which they now are operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution."

"Be It Further Resolved, That should the said railway companies fail to commence such removal within the time above specified, the City Solicitor be and is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution."

"Be It Further Resolved, That the City Clerk be and is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and Interurban Railway Company forthwith."

The City of Des Moines is a municipal corporation and whatever legislative powers it has must be exercised by ordinance enacted as provided in Chapter 3 of Title V of the Code of Iowa, as follows:

Sec. 680. "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

Sec. 681. "No ordinance shall contain more than one subject, which shall be clearly expressed in its title; and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

Sec. 682. "Ordinances of a general or permanent nature and those for the appropriation of money, shall be fully and distinctly read on

three different days, unless three-fourths of the council shall dispense with the rule."

Sec. 683. "No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the concurrence of a majority of the whole number of members elected to the council, to-wit:

1. To pass or adopt any by-law or ordinance.

2. To pass or adopt any resolution or order to enter into a contract.

3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section, shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. In towns money may be appropriated by resolution."

Sec. 684. "No resolution or ordinance for any of the purposes hereinafter set forth, except as otherwise provided by law, shall be adopted without the concurrence of two-thirds of the whole number of the members elected by the council, to-wit:

1. Directing the opening, straightening or widening of any street, avenue, highway or alley.

2. Directing the making of any improvement which shall require proceedings to condemn private property.

3. Directing any improvement or repair of a street, avenue, highway or alley, the cost of which is to be assessed upon the property or against the owners thereof, unless two-thirds of the owners to be charged therefor shall petition in writing for the same.

On the passage of every such ordinance or resolution, the yeas and nays shall be called and recorded."

Sec. 685. "The mayor shall sign every ordinance or resolution passed by the council before the same shall be in force, and, if he refuses to sign any such ordinance or resolution, he shall call a meeting of the council within fourteen days thereafter; and return the

same, with his reasons therefore. If he fails to call the meeting within the time fixed above, or fails to return the ordinance or resolution, with his reasons, as herein required, such ordinance or resolution shall become operative without such signature, and the clerk shall record it in the ordinance book, with a minute of the facts making it operative. Upon the return of any such ordinance or resolution by the mayor to the council, it may pass the same over his objections, upon a call of the yeas and nays, by not less than two-thirds vote of the council, and the clerk shall certify on said ordinance or resolution that the same was passed by two-thirds vote of the council, and sign it officially as clerk."

It is universally held to be the rule that corporate acts must not only be authorized by the charter, but must be done by such officers and agents and in such manner as the charter authorizes.

Bank of Augusta vs. Earle, 13 Peters, 517, 587;
Mayor vs. Ray, 19 Wallace, 468, 475;
2 Kent Com. 299.

Construing the statute quoted above, the Supreme Court of Iowa has held that the legislative power of the city must be exercised by ordinance and cannot be exercised by resolution. Thus, in *Martin vs. Oskaloosa*, 126 Iowa, 680-685, the Court said: "Under our statutory provisions it may perhaps be very properly said that the general authority to provide how a power conferred by the legislature shall be exercised should be by ordinance rather than by resolution. (See Code, sections 680-684.) *Shelby vs. Burlington*, 125 Iowa, 343."

In *McManus vs. Hornaday*, 99 Iowa, 508-10, where a statute in almost the same language of Section 680 was under consideration, it was held that the power to establish the grade of a street must be exercised by ordinance.

Where the power exercised is of a general or permanent nature, it must be exercised by ordinance and cannot be exercised by resolution, and an ordinance cannot be revised or amended by resolution.

Cascaden vs. Waterloo, 106 Iowa, 673, 678, 681;
Eckert vs. Walnut, 117 Iowa, 629;
Zalesky vs. Cedar Rapids, 118 Iowa, 714.

In the opinion of the lower court it is said, Record p. 41: "That

a council can authorize the occupancy of its streets by resolution as well as by ordinance has been held by the Iowa Supreme Court. *Merchants Company vs. Railway*, 70 Iowa, 105; *Street Railway vs. City of Des Moines*, 73 Iowa, 513, 522;" and, Record p. 42: "All agree that when the statute requires an ordinance, that a resolution will not do, and that only is what many of the cases cited hold."

The cases cited construed Sec. 464, Code 1873, now re-enacted as Code Sec. 767: "Cities and towns shall have power to authorize or forbid the construction of street railways within their limits and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places," and the case in 73rd Iowa is decided upon authority of the case in 70th Iowa. If the resolution in the case at bar is a law of the state within the provisions of the contract clause of the Federal Constitution it is because it is a proper exercise of the powers conferred by Sec. 767 of the Code. Section 767 is in the same title, viz.: Title V in which are found Sections 641 and 680 construed in *Cascaden vs. Waterloo*, 106 Iowa, 673. It will be noted that in Section 767 there is no express provision as to how the power shall be exercised, whether by resolution or ordinance. In the Cascaden case the court after referring to the fact that in some sections in Title V the statute provides that the powers thus provided for shall be by ordinance, that the powers in other sections may be exercised by resolution and those in other sections by ordinance or resolution finally holds that where the section conferring the power does not provide for the manner of its exercise the power, if legislative in character, must be exercised by ordinance and on page 680, 681 the court reverses and overrules *Merchants Co. vs. Railway Co.*, 70 Iowa, 106, relied on by the Circuit Court mainly upon the ground that the statutes have been changed since that case was decided.

It follows therefore that the city could not legislate or pass an enactment by resolution which would be a law, or to which the state did or would give the force of law, and that the resolution was not, therefore, a law impairing the obligation of complainant's contract.

If, therefore, the resolution was intended to have the effect claimed by complainant it was ineffectual and void as a matter of state law,

and under the doctrine of the cases above cited there was no Federal question, and the United States Circuit Court was without jurisdiction.

SECOND: That the resolution complained of does not impair the obligation of complainant's contract, because it was an attempt to amend or repeal an ordinance by a resolution, and is, therefore, void as a matter of state law, and is not a law of the state or an enactment to which the state has given the force of law.

In the last above subdivision of this argument we have shown that to come within the constitutional inhibition against laws impairing the obligation of contracts there must be a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

Williams vs. Bruffy, 96 U. S., 176, 183;
Lehigh Water Co. vs. Easton, 121 U. S., 388, 392;
N. O. Water Co. vs. Louisana Sugar Co., 125 U. S., 18, 31, 38;
Iron Mountain R. Co. vs. Memphis, 96 Fed. 113, 126.

We have also shown that where the enactment complained of is void for want of conformity to the provisions of the state law no Federal question arises under it, for it is not a law.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258, 266;
Shreveport vs. Cole, 129 U. S., 36.

In the case at bar, whatever contracts complainant has were made by ordinances passed by the City Council of the City of Des Moines and by certain suburban towns which have been annexed to and merged in the city. (See allegation of the bill, Record p. 1-18.) The enactment complained of is a resolution adopted by the City Council, (Record p. 362-363) and if it can be construed as a law impairing the obligation of those contracts it is because it is an attempt to cancel, repeal or modify the ordinances in question.

When the franchises which are claimed to constitute contracts were granted the city had power to authorize or forbid the location and laying down of street railways tracks. (Code of Iowa, Sec. 767.) It may be that under the doctrine of some of the cases the city could exercise this power either by resolution or by ordinance, but in granting both the Turner Narrow Guage franchise, (Record p. 18) and the

Broad Guage Franchise, (Record p. 138) the city did so by ordinance. In *Cascaden vs. Waterloo*, 106 Iowa, 673, 682, the Supreme Court of Iowa held that an ordinance cannot be amended, repealed or modified by resolution and said: "We conclude that ordinances of a general or permanent nature cannot be amended, repealed or suspended by resolution, but by ordinance only."

If, therefore, the resolution was intended to have the effect claimed by complainant it is void as a matter of state law and under the doctrine of the cases cited above no Federal question arises in respect thereto, and the United States Circuit Court was without jurisdiction to try and determine this cause.

THIRD: That the resolution complained of does not impair the obligation of any contract or deny to complainant due process of law or the equal protection of the law, because if so intended it is in contravention of the Constitution of Iowa and void as a matter of state law.

As we have already shown in this argument, the matters complained of do not come within the inhibition of the Constitution of the United States, unless there is a law of the state or an enactment from some source authorized by law or to which the state gives the force of law.

We have also seen that where the enactment complained of is void for want of conformity to the provisions of the state law or because in contravention of state law, it is not a law, and no Federal question arises under it.

> *Hamilton Gas Light Co. vs. Hamilton*, 146 U. S., 258, 266;
> *Shreveport vs. Cole*, 129 U. S., 36.

The Iowa Constitution provides:

Art. I, Sec. 21. "No * * * law impairing the obligation of contracts shall ever be passed."

Art. I, Sec. 6. "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges which upon the same terms shall not equally belong to all citizens."

Art. I, Sec. 9. "* * * No person shall be deprived of life, liberty, or property without due process of law."

In these provisions the Constitution of Iowa therefore secures to complainant the same guarantees against impairment of its contract, and against denial of due process of law and the equal protection of the law that are secured under Art. I, Sec. 10, and Sec. 14 of the Amendment to the Constitution of the United States. If, therefore, the resolution can be construed to be a legislative act, and to impair the obligation of complainant's contracts, it is prohibited by the State Constitution and void as a matter of state law; if the resolution and the acts complained of do or will deprive complainant of its property without due process of law, or deny the equal protection of the law, they contravene the Iowa Constitution, and are prohibited and void as a matter of state law.

If, therefore, the resolution and proceedings had or have the effect claimed by complainant, they are void under the laws of the state; there is no enactment to which the state has given the force of law for the purpose of impairing the obligation of a contract, or denying complainant due process of law or the equal protection of the law. No Federal question arises upon the matters complained of, and the United States Circuit Court was without jurisdiction.

FOURTH: That the resolution complained of does not impair the obligation of any contract, or deny to complainant due process of law, or the equal protection of the law, because the resolution was not a legislative act but was passed for administrative or executive purposes only.

In *New Orleans Water Co. vs. Louisana Sugar Co.*, 125 U. S., 18, 31, 38, it was held that the prohibition in the constitution is aimed at the legislative power of the state, and not at the decisions of its courts or the acts of its administrative or executive boards.

And in *Iron Mountain R. Co. vs. Memphis*, 96 Fed. R., 113, 126, the court said: "If such ordinance is administrative rather than legislative, then it is not within the constitutional inhibition even though it impairs the obligaton of a contract. *N. O. Water Co. vs. La. Sugar Co.*, 125 U. S., 18."

The record in this case shows that the resolution was not legislative, but an administrative or executive act only, intended to instruct the solicitor as the law officer of the city, and authorizes him to bring and prosecute an action. The resolution as set out in the bill (Record p. 15) shows that its purpose was not to change the rights and relations of the parties, but to secure a determination thereof, and the evidence shows that the only purpose was to give the solicitor authority to institute proceedings in court to determine what are the rights of the company.

See testimony of W. H. Bremner and exhibits therewith, Record p. 359, 366.

The form of the resolution and its purposes were similar to the resolution considered in:

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

In that case the facts were substantially as follows: The charter of the St. Paul Gas Light Co. was granted in 1856 and expired in 1907. It was provided in the charter that whenever the Board of Aldermen of the City of St. Paul should so direct, lamps were to be erected and lighted in the streets of the city, and further provided for the price to be paid by the city for the use thereof. Under this provision the St. Paul Gas Light Company had installed 3362 lights up to January 1, 1897. Shortly thereafter the city, having commenced the use of electricity for lighting purposes, passed the following resolution:

"*Resolved*: That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the Board of Public Works."

The resolution further provided that from and after the passage of the resolution, no interest be paid to the said St. Paul Gas Light Company on account of the purchase and equipment of said gas street lamp posts. It is claimed on the part of the company that the passage of this resolution was the passage of a law impairing the obligation of the contract embodied in the charter; and upon this question the Supreme Court, Mr. Justice White, delivering the opinion, says: "Referring to the ordinance in question, from the provisions of which

it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to; the first, a command by the city to the gas company to 'forwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;' and second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. * * * Now it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. * * * The other provisions in question created no new right or imposed no new duty substantially antagonistic to the obligation of the contract, but simply expressed the purpose of the city, not in the future to pay. * * * That is to say, it was but a denial by the city of its obligation to pay and a notice of its purpose to challenge in the future the existence of the duty to make such payment. * * * As it is apparent from the foregoing consideration that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this Court."

Neither the resolution complained of, nor the acts done, or contemplated by the city, deprive complainant of its property without due process of law, or deny the equal protection of the law.

The bill charges the passage of the resolution, (Record p. 15) but it is nowhere alleged that the city or its officers have done anything under the resolution or intended to do anything except what is directed in the resolution, viz.: "That the city solicitor be and is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution." The

bill recites what would be the effect of tearing up or obstructing tracks, but does not charge that there has been any physical interference, or that any is contemplated or threatened.

The powers and duties of the city solicitor of Des Moines, are defined in Section 35 of the Revised Ordinance of 1900,(Record page 399) as follows:

"The solicitor shall have and exercise all of the powers and perform all the duties provided or prescribed by law or the Ordinances of the City. It shall also be his duty to prosecute or defend all suits to which the city is a party in all the courts of the city, state and United States, to prosecute all suits for violation of any city ordinance, and all criminal prosecutions before the police court. He shall when requested or whenever in his opinion it is necessary advise the city council and the officers of the city upon all legal questions relative to the business of the city or matters in which the city is interested, which advice shall whenever practicable be given in writing. He shall draw all contracts to which the city is a party. He shall examine and report in writing to the city council upon all ordinances prior to their final passage by the city council."

In the absence of a provision in the resolution of November 21, 1908, prescribing the manner in which he is to act, it must be presumed that it was the intention of the council that he should act only within the limits of the powers he possessed under the general ordinance of the city.

The answer denies that it is the intention of the city to tear up tracks or interpose any physical obstruction or interference with the street railway or the operation thereof, and states, Record p. 27:

Par. 27. "That this defendant denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff herein, unless it shall be declared by some court of competent jurisdiction that the plaintiff has no right to maintain or operate said system. That it was the intention of the City of Des Moines in the passage of the resolution heretofore referred to, to simply lay a foundation for the commencement of an action for the purpose of testing the rights of the plaintiff to so maintain and operate its said railway system, and further states that it is the intention of the said city to commence an action in equity in the District Court of the State of Iowa, in and for Polk County, it being

a court of competent jurisdiction, for the purpose of testing such rights, and that the City of Des Moines has no intention to do otherwise than this, and does not now threaten and never has threatened to interfere with the plaintiff by force, or to attempt to take away or forfeit any rights, privileges or franchises which the plaintiff herein claims to have, except under and by due process of law."

"Par. 28. That it is not now and never has been the intention of the City of Des Moines to take from or attempt to take from the plaintiff herein any rights which it may have under and by virtue of the ordinances referred to in the bill of complaint; but that the City of Des Moines is simply seeking to have the rights of the plaintiff fully determined by a court of competent jurisdiction to the end that the plaintiff herein may not exercise rights and privileges of which it is not the possessor. That the City of Des Moines is simply seeking to protect and preserve its own rights and the rights of the public by resorting to a court of competent jurisdiction."

It would be the duty of the solicitor to bring and prosecute proceedings in court and nothing more was or could be meant by the words of the resolution, "to take such action as he shall deem advisable or necessary to secure the enforcement of the above resolution."

It is universally held that the prohibition in Art. XIV of the Amendments to the Constitution, against deprivation of property without due process of law is intended to protect property from confiscation by legislative enactments, from seizure, forfeiture and destruction without a trial and conviction by the ordinary modes of judicial proceeding.

10 Am. & Eng. Ency. of Law, p. 292, note 2; p. 293, note 2: "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice." *2 Kent Commentary*, 13.

It is said in *Caldwell vs. Texas*, 137 U. S., 692, 697 and *Leeper vs. Texas*, 139 U. S., 462, 468, that: "Law in its regular course of administration through courts of justice is due process and when secured by the law of the state, the constitutional requirement is satisfied."

Neither in the allegations in the bill nor in complainant's evidence, is there one fact, as distinguished from a mere assertion of a conclusion, from which it appears that there has been or will be any denial of due process of law, while from the answer and the defendant's evidence it appears affirmatively that there is and will be

no deprivation of property or of rights of property claimed, except through ordinary proceedings in courts of competent jurisdiction. The record does not show any infringement of the guarantees in the Fourteenth Amendment, and there is no Federal question in the case.

A recent case upon this subject is *Tracy vs. Ginsberg*, 205 U. S., 170, 177, in which it was held that the denial of the claim of a party to property or property rights by the judgment of a court in the orderly and regular course of procedure, is not a deprivation of propety without due process of law within the meaning of the Constitution. In the opinion it is said: "The Fourteenth Amendment did not impair the authority of the states by their judicial tribunals and according to their settled usages and established modes of proceedure to determine finally for the parties before it, controverted questions as to the ownership of property which did not involve any right secured by the Federal Constitution or by any valid act of Congress or by any treaty."

II.

EQUITABLE JURISDICTION.

That complainant is not entitled to an injunction or to any equitable relief.

1. That the resolution having been adopted at the instance and request of complainant it is not entitled to an injunction to restrain the operation thereof.

2. That the allegations in the bill having been denied in the answer and not being sustained by the evidence, complainant is not entitled to an injunction.

3. That complainant is not entitled to an injunction to prevent the bringing and prosecution of actions in courts of competent jurisdiction.

FIRST: That complainant is not entitled to an injunction or to any equitable relief because the resolution complained of was adopted at the instance and request of complainant.

The Railway Company asks that an injunction be granted to restrain the city from proceeding under a resolution passed by the coun-

cil on November 21, 1905, which after reciting that there were controversies between the company and the city which ought to be speedily determined, ordered the company to remove its tracks from the streets within twenty-five days and provided: "That should said railway company fail to commence such removal within the time above specified the city solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution."

The history of the resolution and of the acts which preceded its passage is fully related in the testimony of W. H. Bremner, city solicitor. (Record p. 359 to 368.) Briefly stated the facts were as follows: Robert Fullerton and others as relators had brought an action in the nature of quo warranto in the name of the State of Iowa against the Railway Company to test its right to the franchise which it claimed to have. A motion to dismiss was filed and thereupon the relators filed with the council a written petition requesting that the city join in the litigation. The matter was referred to the solicitor who reported recommending that the city join in the litigation to test the rights of the company either by joining in the pending action or by an independent suit. Thereupon an attorney for the company gave to one of the council, with the request that it be introduced and passed, a resolution the same as that finally adopted except that for the evident purpose of bringing it within the case of *Iron Mountain R. Co. vs. Memphis*, 96 Fed. R., 113, the resolution directed the board of public works to tear up the tracks if the company failed to obey the order to remove them. The proposed resolution coming to the attention of the solicitor, he changed it to the form in which it was passed with the purpose of making it merely a direction to the solicitor to bring and prosecute proceedings in court. During the time the resolution was in the hands of the solicitor the attorney for the Railway Company called on him to inquire what were his objections to the proposed resolution. In these and other ways it is made evident that the Railway Company was active in securing the passage of the resolution of which it now complains. The testimony of Mr. Bremner upon this matter stands without any attempt on the part of the company to either contradict or explain the claim that it was active in securing the passage of the

resolution and that it was passed at the instance and request of the company.

It needs no citation of authorities to sustain the proposition for which we contend, namely, that the complainant is not entitled to an injunction to restrain the city from carrying out the resolution which the company procured to be passed.

SECOND: That complainant is not entitled to an injunction or to any equitable relief because the allegations in the bill are denied in the answer and are not sustained by the evidence.

The relief sought by the bill is an injunction to restrain the city and its officers from proceeding to enforce the resolution and from obstructing or interfering with the free use of the street railway tracks and other property and rights. In the answer (Record p. 27, par. 27 and 28) the city denies that it is the intention of the City of Des Moines to interfere with the maintenance and operation of the street railway system of the plaintiff, unless it shall be declared by some court of competent jurisdiction that plaintiff has no right to maintain or operate said system, and alleges that all that was or had been done or intended was to bring and prosecute proceedings in courts of competent jurisdiction to determine the rights of the respective parties. The company offered no evidence to show that the city had done or intended to do anything whatever under the resolution complained of or had done or threatened or intended to do anything which would obstruct or interfere with the tracks or other property of the company or the free use thereof while the evidence for the city shows that not only was not physical interference with the company or its property intended or proposed, but that all that was intended or proposed was to bring and prosecute proceedings in courts of competent jurisdiction to ascertain and settle the respective rights of the parties. *Testimony of W. H. Bremner*, Record p. 365, 366.

THIRD: That the company is not entitled to an injunction or to any equitable relief because the only act intended or contemplated is the bringing and prosecuting in courts of competent jurisdiction of proceedings to determine the rights of the parties.

In the bill, complainant recites what would be the consequences of tearing up the tracks or a physical interference with the operation of

its road but it is not alleged that anything of the kind had been done or was intended. Complainant offered no evidence to show what had been done or was threatened or intended to be done by the city or its officers and especially did not offer any evidence of any act done or contemplated which would interfere with the tracks or property of the company or the use thereof. In the answer (Record p. 27 and 28) the city alleged that all that it had done or intended to do was to bring and prosecute proceedings in courts of competent jurisdiction to ascertain and have determined the respective rights of the parties and denied anything else had been done or was threatened or intended to be done. The evidence offered by defendant, testimony of W. H. Bremner (Record p. 365-366) shows that all that had been done or was threatened or intended to be done by the city or its officers, was to bring and prosecute in courts of competent jurisdiction proceedings to ascertain and determine the respective rights of the company and the city. That in addition to the action in the nature of quo warranto brought in the State District Court in the name of the State of Iowa by Robert Fullerton and others and to which the city is made a party the city has pursuant to the resolution complained of, brought a suit in equity in the State District Court and that both of said proceedings are pending.

The facts, therefore, do not present a case in which the complainant is entitled to an injunction or to any relief in a court of equity.

In High on Injunctions, Sec. 64, the rule is stated thus: "It is to be observed that mere apprehension or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such action. * * Nor will the court enjoin threatened prosecutions at law upon the ground of the unconstitutionality of an act of the legislature under which the prosecutions are to be brought since such alleged unconstitutionality cannot of itself be made a ground for equitable jurisdiction."

In *Wolfe vs. Burke*, 56 N. Y., 115, 119, the court said: "The danger of judicial proceedings is not an injury justifying an injunction. *McGuire vs. Palmer*, 5 Robt., 607."

And in *Wallack vs. Society*, 67 N. Y., 23, 28, it was said: "The

general rule is that the court will not restrain a prosecution at law where the question is the same at law and in equity. *Wolfe vs. Burke*, 56 N. Y., 118. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such a case by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action."

In *Cape May vs. Cape May D. B. & S. F. R. Co.*, 60 N. J., Law 224, the railway company had extended its tracks on a street under claim of right; the city council adopted a resolution which after reciting that the track was laid without authority and was an obstruction to public travel provided: "Resolved that the company be notified and requested to remove said extension at once and if they shall refuse to comply with such notice and request that said committee shall be empowered and directed to employ counsel and take legal measures on behalf of the city to enforce the same." In a suit brought by the company the lower court set aside the resolution and upon appeal this action was reversed. The court said: "We do not, however, concur with the judgment of the Supreme Court in setting aside the resolution. It only provides that the street committee shall notify and request the railway company to at once remove the extension of its track and instructs them in case of refusal to comply with such notice, to employ counsel and take legal measures to enforce its removal. We think it was clearly within the power of the council to pass such a resolution. It did not of itself affect any property right of the railroad company and therefore no notice was required to be given before passing it. By its terms it was only a notice and request. No summary or arbitrary action was advised or suggested, but rather the contrary; for the committee is directed to employ counsel and take legal measures to accomplish the object proposed. It is always lawful to employ counsel and take legal measures to remedy a real or supposed grievance, whether public or private, and we think the instructions to the committee were unobjectionable." The resolution in the Cape May case was not in legal effect different from that complained of in the case at bar and that case is an authority denying jurisdiction in this case to interfere with or restrain the proceedings authorized by the resolution.

Of the jurisdiction of a court of equity, Judge Swan in *Detroit vs. Detroit City Ry. Co.*, 56 Fed. R., 867, said (page 898): "It is a familiar maxim of equity jurisprudence that 'nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence.' Another maxim is that 'he who seeks equity must do or offer to do equity.' The relief prayed calls for the exercise of one of the highest powers of a court of equity, aptly termed in *Irwin vs. Dixon*, 9 How. 33: 'The extraordinary or transcendent power of injunction, and is, therefore, to be used sparingly and only in a clear and plain case,' and of which it is well said in *Bonaparte vs. R. Railroad*, Baldw., 217, 218 (1617 Fed. Cas. 821-827): 'There is no power the exercise of which is more delicate, requires greater caution, deliberation and sound discretion, or more dangerous, in a doubtful case. * * * It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, when courts of law cannot confer an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective, preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well established principles, for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress; it being the act of a court, not of a party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured or great and lasting injury about to be done, by an illegal act.'"

III.

Municipalities in Iowa have not the Power to Grant to a Street Railway the Right to Occupy Streets in Perpetuity.

Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority.

In the case of *Clark vs. City of Des Moines*, 19 Iowa, 199, decided in 1865, the question involved was as to whether or not the City of Des Moines had power to issue negotiable bonds which in the hands of a bona fide holder would be free from defenses to be made by the city.

In reference thereto the Court, on page 212 of the opinion, speaking through Dillon, Justice, said:

"It is a familiar and elemental principle that municipal corporations have and can exercise such powers and such powers only as are expressly granted, and such incidental ones as are necessary to make those powers (expressly granted) available and essential to effectuate the purposes of the corporation and these powers are strictly construed."

In the case of the *City of Keokuk vs. Scroggs*, 30 Iowa, 447, the question involved was as to whether or not the city council had the power to compel the owner of a lumber yard to remove the same from the territory included in the fire limit. The charter of the city provided:

"The city council shall have power to make and publish all ordinances that shall be necessary to secure said city * * * against injuries by fire * * * They shall have power * * * to make and publish all laws and ordinances as to them may be deemed necessary to provide for the safety, * * * order, comfort and convenience of said city, and the inhabitants thereof; to impose fines and penalties on all persons offending against the laws and ordinances of said city, * * * the city council, for the purpose of guarding against the calamities of fire shall have power to prescribe the limits within which wooden buildings shall be erected, or placed or repaired, and to direct that all or any buildings within the limits prescribed shall be made or constructed of fire proof material, and to prohibit the repairing or rebuilding of wooden buildings within the fire limits when the same shall have been damaged to an extent of fifty per cent."

The court said, on page 450:

"Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority. The state legislature may exercise such power of government coming within a proper designation of legislative power as the Constitution does not expressly or impliedly prohibit; but cities can exercise those powers only which are expressly or impliedly conferred, and these must be exercised subject to such restrictions and regulations as the grant imposes. The charter or general law under which they exercise their power is their constitution, and from it they must show authority for the acts they perform.

"Municipal corporations can exercise such powers only as are expressly granted, and such implied ones as are necessary to make available the powers expressly conferred and essential to effectuate the purpose of the corporation, and these powers are strictly construed."

In the case of *Brockman vs. City of Creston*, 79 Iowa, 587-9, the plaintiff sought to enjoin the defendant from conveying to the county in which the defendant was located certain lots and buildings thereon, which the city had agreed to donate to the county if it would remove the county seat from Afton to Creston and in holding that the defendant had not the power to make such a gift, the court, on page 589, says:

"It is a familiar rule of law that cities and other municipal corporations can exercise only such authority as is expressly granted by their charters or legislative acts creating them, or necessarily implied in such grant, or incidental thereto; and reasonable doubts as to the existence of authority in such corporations are always to be resolved against it."

As applied to the specific question involved, the court says:

"No statute of this state grants cities the authority to dispose of or convey their property except for purposes contemplated by law. They have power to dispose of their real property for purposes authorized by law and for no other purpose. The purpose of the disposition of the land determines the question of authority. * * * The city holds its property for the uses and benefits of the people. It is, as it were, a trustee for its citizens, and must use the property it holds for purposes sanctioned by law. There is no statute authorizing a city to erect buildings for the county, or to give it a house and lands to induce the re-location of the county seat."

A municipality has no inherent power and without authority granting such power cannot authorize a street railway company to lay down tracks on its streets and operate cars over the same.

Judge Dillon, in his work on Municipal Corporations, Section 716, commending the judgment of the Supreme Court of New York in the case of *Davis vs. New York*, which involved the power of the city without legislative authority to authorize the construction and operation of a street railway, said:

"The powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private parties, either corporate or natural. In this case, there was no such authority, and hence the resolution of the council, authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation and without limit as to time, was not a license or act of legislation, but a contract, void, however, because if valid it would deprive the corporation of the control and regulation of its streets."

In Section 717, he says:

"In Great Britain, legislative authority or sanction is necessary to enable a town or others to occupy the streets or highways for the purpose of a horse or street railway, and such is doubtless the law in this country."

In the case of *Milhau vs. Sharp*, 27 N. Y., 611-619-622, the question was as to whether the common council of the city had authority to grant the right to construct and maintain a railway through Broadway. The court said:

"The granting of franchises was a part of the prerogative of the British crown, which, on the severance of the colonies from Great Britain, became vested in the people; and no franchise can be created in this state without authority to create it derived from the people through the legislature. * * * The corporation nor the common council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution relating to a subject not within the powers of the body passing it, is merely void."

In the case of *Gozin vs. Ghicago*, 132 Fed., 848, 854, (C. C. A.) the complainant claimed the right to construct and operate a street railway, basing such claim on the power of the city inherently to grant said right. The court said, Judge Grosscup delivering the opinion:

"At first it was thought that under this general power over streets, the municipality, in whose streets street railways were to be laid, might have power to authorize the construction and operation of such roads, but this view was quickly dissipated by the courts. With unanimity, the courts decided that the legislatures of states, alone, possessed such power; that the municipality had no such power; and that the power could be exercised by the legislature without the consent of the municipality, or even a reference to its wishes."

The streets and highways are under the exclusive control of the General Assembly.

In the case of *Stanley vs. City of Davenport*, the question involved was the authority of the City of Davenport to authorize the use of a steam motor on its streets, where its charter nor the ordinances prohibited the street railway company from using other than animal power in the operation of its road, nor did the charter or ordinance contain a grant to that effect. The court said:

"Streets and highways are under the exclusive control of the general assembly. It matters not if the fee of the streets is in the city. It has

no authority to control or grant rights and privileges thereto or thereon unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the state. The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it, or authorize the streets to be used for private purposes; nor can it, without legislative authority, grant the use of a street for public purposes which renders it dangerous for the public to travel over it in any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state."

In the case of *Dickinson County vs. Faus*, 112 Iowa, 21-3, which involved the question of the right to maintain a public highway, the court said:

"By special provisions of the Code, boards of supervisors have power to establish, maintain and discontinue highways; and for the purpose of keeping them in repair, certain authority is given to township officials. Nevertheless, these powers are attributes of sovereignty. For convenience, they are delegated; but nothing goes with them not expressed or necessary to the performance of the duties named. Were it not for the statutes mentioned, the power to lay out, discontinue and improve highways would be in the state, which is the representative of the general public. It follows, therefore, that, when such an easement is created, the ownership thereof, if we may use the expression, is in the state. Even where the fee of a street is in the city, we have said such street, so far, at least, as concerns the right to permit its use by other than ordinary travel, is under the exclusive control of the general assembly."

A municipality, under its charter powers to lay off, open, widen, straighten, or to narrow or vacate, or to extend, improve or keep in order and repair streets, does not have the power to authorize the construction of a street railway thereon.

In the case of *Davis vs. Mayor, etc.*, 14 N. Y., 514-17, which was a case involving the power of the common council of the City of New York to grant the right to use its streets by a street railway, and is the first case on the subject in this country, the court said:

"The power of the corporation (City of New York) over this subject is necessarily very large. It may lay out, open, altar, repair and amend and regulate streets, lanes, alleys and highways, and may direct the drainage, pitching and paving of them. * * * and may discontinue and close up streets in the manner specified in the act. But

this power relates to and is confined to streets, lanes, etc., as such. Everything which is fairly within the idea of regulating, altering, repairing or amending the streets, with a view to their uses and purposes as streets, may be exercised by the corporation, but the converting of a street or a part of a street into a new piece of machinery for transporting persons with which the existence of a street has no natural or necessary connection, is not, in my judgment, at all within the purview of the charter and acts of the legislature to which I have referred. If an existing street can be converted into a railway, I see no reason why the corporation cannot authorize the laying out of a railroad where at present no street exists. They have as ample power to lay out and establish streets as to altar and amend them; and if they can consider a railway as falling within the legal notion of a street, the power extends as well to the laying out of new railroads as to changing the present streets into railroads. * * *

"The foregoing considerations have led me to the conclusion that the resolution of the common council, granting to the defendant Sharp and others the right to lay down a railroad in Broadway, was without the scope of the powers of the corporation, and was wholly unauthorized and illegal.

"But I think it was illegal for another reason. * * * The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The corporation of New York may without doubt, make grants of this character respecting the public waters which surround the city, but independently of that power, which is in terms conferred by the charters, they have no more authority to make such a grant than any other administrative board in the state. If they could make this grant, they could charter, upon the city streets, a turnpike or plank road company. They could grant to individuals the right to pave or otherwise improve the streets, and to impose tolls thereon to be exacted from all who should travel upon them. * * * The board has no power to grant to any person a franchise for transporting passengers on the public streets, for profit, for a single day, and the attempt to do so was absolutely void."

In the case of *Stanley vs. City of Davenport*, 54 Iowa, 463-7-8, which was an action in which one of the questions involved was the power of the city to authorize the location of a street railway and use a steam motor thereon, the defendant city was organized under a special charter, and the court said:

"The charter empowers the defendant to open, altar, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair streets, avenues and alleys. That the requisite power is not contained in the charter we regard as beyond serious controversy. * * * It may be that cities organized under the general incorporation law

have such authority; if so, it is because there is a statute to that effect. Code, Section 464.

"The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it or authorize the streets to be used for private purposes. Nor can it without legislative authority grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state."

In the case of the *Peoples Railroad Co. vs. Memphis Railroad Co.*, 10 Wall., 38, which was an action involving the power of the city council to grant the right to construct a street railway over the streets of the city for twenty-five years, the corporation was vested with the power to lay out, open, altar, repair and amend streets, and also "to grant privileges in the use and enjoyment of the streets of the municipality," the court said:

"It would be a forced construction to hold that the power to grant such a franchise for street railway purposes for twenty-five years is included in that provision. Such corporations are usually invested with the power to lay off, open, alter, repair and amend streets within the corporate limits; but the rule is well settled, that by virtue of those powers without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void."

At the time of the granting of the franchise of December 10, 1866, the only power granted to and vested in the municipality of the City of Des Moines in reference to the streets, alleys and public places therein was:

"To lay off, open, widen, straighten, or to narrow and vacate or to extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, etc." (Section 1064 of the Revision of 1860.)

From this grant of authority it will be seen the City of Des Moines was not clothed with the power to make the grant contained in the ordinance of December 10, 1866, even to the extent of permitting the grantee in the ordinance to use the streets, alleys and public places of the City of Des Moines for street railway purposes. The right to make such grant of power must be found in the statute clothing the munici-

pality with the right to make such grant, or notwithstanding the making of it, the grantee would receive nothing. If the grant of power had been sufficiently broad to give the city the right to prescribe, control and regulate the manner in which the streets, alleys and public places should be used and enjoyed, this would probably have been sufficient authority to permit the grant of the right to use the streets, alleys and public places for street railway purposes for a reasonable time, and upon reasonable terms, but the grant contained in the statute was not not so broad and did not give the city the right to determine or regulate the manner in which the streets, alleys and public places should be used and enjoyed. By enactment of the Code of 1873, Iowa, Section 464, now Section 767 of the Code of 1897, further legislation was enacted. This section provides:

"Cities and towns shall have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places, etc."

It was after the enactment of this provision that the Supreme Court of Iowa, in the case of *Des Moines Street Railroad Company vs. the Des Moines Broad Guage Street Railway Company*, 73 Iowa, 513-517, recognized the fact that there had not been any legislation granting to the city the power to enact the ordinance of December 10, 1866, but calls attention to the fact that Section 464 of the Code of 1873, had been enacted since said date, and that by reason of such enactment the city had the authority to authorize or forbid the laying down of tracks for railway and street railways, and that by reason of the fact that in 1874 the City of Des Moines adopted a revision of its ordinances and included therein the ordinance of 1866, the city council of the City of Des Moines had ratified the ordinance of 1866, and that the contract expressed in such ordinance was in force. The court, however, did not pass upon the question of the duration of the franchise or contract, nor was the question of the duration or term of the franchise involved.

Code Section 464 gave the city the power to enact an ordinance granting the use of its streets, alleys and public places for street railway purposes, but did not grant it the power to pass such an ordinance or make such a contract for an unlimited time or in perpetuity.

A municipality cannot grant an exclusive or perpetual right to lay down and operate street railways over its streets, alleys and publia

places unless it is authorized and empowered so to do by the legislature by a grant in specific and explicit terms.

Mere authority "to authorize or forbid the use of its streets by street railways is not sufficient, and nothing short of the grant of power to authorize the use of its streets by street railways for an unlimited time, or in perpetuity, would be sufficient. It cannot be fairly claimed that the authority to authorize or forbid the use of its streets by a street railway company would carry the right to such use for more than a reasonable length of time, nor can it fairly be claimed that the implication would arise or that it would be necessarily implied that an unlimited term or perpetual right would be necessary or incidental to the operation of a street railway upon the streets, alleys and public places of the city. The whole history of franchises in this country is to the contrary, the rule being that the term of the grant is limited as to time in the case of street railways in every city of importance in the land.

In the case of *Nash vs. Lowery*, 37 Minn., 263; 33 N. W., 787-8, the City Council of the City of St. Paul had passed an ordinance granting in terms to certain persons named, or to their heirs or successors in interest, the consent of the Council to lay a line of railway with single or double tracks, with necessary and convenient turnouts, etc., in any or all of the streets of said city, the cars thereon to be propelled by none other than animal power. The parties named organized and assumed to and did act as a corporation and took over and exercised the rights specified in the ordinance. The company mortgaged its franchises and other property. Afterwards the property was sold under this mortgage, and another company took the same over, and the common council passed an ordinance which, in terms, granted and confirmed and continued to and in the St. Paul City Railway Co., the rights, privileges and franchises granted and specified in said former ordinance. The legislature confirmed and validated this ordinance. Before anything was done toward laying the tracks on certain streets, the common council passed an ordinance repealing the ordinances granted. The court said:

"It is immaterial to this question that said company is or is not a corporation.. * * * And also, * * * the grant by the ordinance is in the nature of a contract, and if valid as to the city, the common

council could not rescind it. The ordinance when passed was invalid as an irrevocable contract, for it is undoubtedly the rule, in accordance with both principle and authority, that a municipal corporation, entrusted with power or control over public streets, cannot, by contract or otherwise, irrevocably surrender any part of such power without the *explicit* consent of the legislature, because such power is in the nature of a trust held by the corporation for the state."

In the case of *Long vs. City of Duluth*, 51 N. W., 913-4, (Minn.), the village of Duluth was authorized to provide for and control the erection of water works in said village for the supply of water, and to grant the right to one or more private companies, and to authorize such company or corporation to lay water pipes and mains into and through the streets of the city of Duluth. The village passed an ordinance granting such right to the water company for thirty years. The village on its part agreed to abstain for that period from granting to any other party the right or privilege to lay water pipes in the streets or public grounds, and agreed likewise to abstain from building such water works. The question involved was as to whether or not the city had disabled itself from building water works of its own. The court said:

"In simple form, the question is whether the village had the power to grant an exclusive franchise, and thus to disable itself: The adjudications upon the subject show it to be no longer a matter of doubt that the legislature, acting presumably for the public good and with due regard for the future as well as the present interests of the state, may grant exclusive franchises like that which are claimed to have been bestowed upon this water company; and when that has been done, and the grant accepted and acted upon, it becomes a contract by which the state is effectually bound, and its future governmental powers are thereby impaired. It may be admitted, too, that the legislature may delegate to a municipal corporation the authority by contract to confer such exclusive privileges concerning matters properly pertaining to municipal affairs; but it is a well-settled principle of construction, applicable both to direct legislative grants and to those indirectly made through the action of municipal corporations, that exclusive rights of this nature are not conferred, and a statute which thus has the effect to impair the power of the legislature for future action should be construed most strongly in favor of the state. If there is any ambiguity or reasonable doubt arising from the terms used by the legislative or granting body, as to whether the exclusive franchise is being conferred or *authorized* to be conferred, the doubt is to be resolved against the corporation or individual claiming such a grant. Public policy does not permit an unnecessary inference of authority to make a contract inconsistent with the continuance of the sovereign power and duty to

make such laws as the public welfare may require. It is hardly necessary to advert, in this connection, to the fact that municipal corporations have only such powers as are conferred by the legislature; and the same principle of strict construction, which forbids that a direct grant of a franchise by the legislature be construed as exclusive, is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies of the state to grant exclusive franchises or privileges must be as explicit and free from doubt as would be required if the franchise were created directly by the legislature. The power to make the exclusive franchise is denied."

In the case of the *State vs. Minnesota Transfer Co.*, 83 N. W., 32, there was involved the question of whether the city of St. Paul had the power to bind itself to forever maintain a certain bridge over the tracks of the defendant and forever prohibit all crossings at grade of the tracks of the defendant company after the bridge was completed, including crossings by motor lines; the company, on its part, agreeing in consideration of the city binding itself to do these things, to construct the bridge; and upon the question of the power of the council to make such an agreement, the court says, commencing on page 34:

"We have already held that the power of municipal authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away control or embarass their legislative or governmental powers or render the municipality unable, in the future, to control any municipal matter over which it had legislative control; and also that a municipal corporation entrusted with powers of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the *explicit* consent of the legislature, because such power is in the nature of a trust held by the corporation for the state."

In the case of *Brenham vs. Brenham Water Co.*, 4 S. W., (Tex.) 143-148, the question was as to the power of the city of Brenham to contract with a company for the furnishing of water, granting an exclusive privilege for twenty-five years, where the charter of the city provided that it "shall be capable of contracting and being contracted with," and gave it power to provide the city with water for the convenience of the inhabitants and the extinguishment of fire, and that the company receiving such right could lay pipes through the streets with the consent of the city and furnish water to the inhabitants thereof; and there was a general law which authorized the

city, in which a water company was authorized, to contract with it for supplying the city with water. The court denied the right to contract for any definite period, and said:

"The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. * * * Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them."

The court further said:

"A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those *necessarily or fairly implied in or incident* to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, * * * not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.

"No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given.

"The power given to a municipal corporation to contract in relation to a given subject matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city nor any other act of the legislature can abrogate it. * * *

"It is now universally conceded that 'powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. * * * The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had

expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law."

And on page 152 it is said:

"Municipal officers hold but for short terms, those of the City of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs, as near as may be, in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporation."

In the case of *Thrift vs. Board of Commissioners*, 30 S. E., 349-51, which involved the power of the city of Elizabeth to grant an exclusive franchise for light purposes, the court said:

"All authorities hold that no such exclusive privilege can be granted by a municipal corporation without express legislative authority."

In the case of *Pennsylvania R. R. Co vs. Canal Commissioners*, 21 Penn. State, page 922, which involved the right of the Pennsylvania Railroad to carry freight over the Columbia River, which was denied by the Canal Commissioners, the court said:

"It may be that the privilege which the relators claim might arise by implication out of their charter, or some other of the acts cited by their counsel, if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the legislature."

In the case of *Logan & Son vs. Pyne*, 43 Iowa, 524-5, which involved the power of the city of Dubuque in granting to the plaintiffs the exclusive privilege and franchise of running for hire omnibuses

for purposes of conveying persons, passengers, and travel and baggage upon the streets of the city to and from the hotels, steamboat lines, and railway stations, the court said:

"The power of municipal corporations is strictly confined within the limits prescribed by the statutes creating them, and will not be extended by the courts upon mere inference. It always depends upon express grant, or must be necessarily implied as incident to other powers expressly granted, or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favor of the public.

"A municipal corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy.* * *

"The power to grant monopolies does not appertain to a municipal corporation, unless upon express grant. It cannot be claimed that a general grant of such powers as pertain to cities would include such as can only be exercised under an express grant. Such a rule would abrogate the doctrine restricting the city to the exercise of such powers as are expressly conferred upon it and carries on its face an obvious construction of terms."

In the case of *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234-241, which was an action to restrain the city from reducing the rates fixed in a franchise, one of the questions involved was as to whether the franchise was granted for a fixed term of 25 years or was without limit as to time. The courtsaid:

"Grants of franchises in perpetuity, or for unreasonably long periods of time, are regarded as against public policy; and if ever valid, the authority therefor must be found in the constitution or statutes of the state."

In the case of *State vs. Cincinnati Gas Light Co.*, 18 Ohio State, 262, which was an action involving the power conferred upon the city of Cincinnati to grant an exclusive franchise for the use of the streets and alleys for the laying of gas pipes therein for the distribution of gas for sale to the inhabitants of such city, the court, after referring to the case of the *Norwich Gas Light Co. vs. Norwich City Gas Light Co.*, 25 Conn., 19, in which the court had held that

a franchise, exclusive for twenty-five years, was void as against public policy, on page 294, said:

"But we do not propose to inquire into the power of the state legislature to confer, either upon a corporation or a natural person, any or all of the franchises and rights with which the present defendant claims to have been invested. And assuming that such a power may be exercised directly we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book, in express terms, or arise from the terms of the statute by implication, so direct and necessary as to render it equally clear.

"By the act of March 1, 1834, 'to incorporate and establish the city of Cincinnati,' power was given to the city council to light said city, or any section or portion thereof, on petition of not less than two-thirds of the lot-owners in the part or parts of the city so to be lighted and to defray the expenses by assessment of a special tax on the lots situated therein. * * *

"But, on the 16th of March, 1839, an act amendatory of the charter was passed, the third section of which is as follows:

"'Sec. 3. That said city council shall also have power to cause said city, or any part thereof, to be lighted with oil or gas, either by petition, as provided for in the act to which this is an amendment, or without petition, and to levy and collect such taxes for that purpose, from the real estate bounding on the section or sections which may be so lighted, and in such manner as they may provide by ordinance, etc.'"

On page 295, the court said:

"The authority to make the contracts must therefore be found, if at all, in the general grant of power to cause the city to be lighted with oil or gas. This power carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the power expressly granted; hence we see no reason to doubt that the city council might, by contract, provide for the lighting of the city by gas; and as the use of the streets and alleys for the purpose of laying gas pipes therein would be almost, if not wholly indispensable to such an undertaking, it would clearly be competent for the city council to grant to the contracting party the right to such use. But

no such necessity is perceived for making such right exclusive. The same streets might consistently be used by two or more persons or companies for the purpose of laying down their gas pipes. If, under the general power here given, a single city council might bind its successors not to make or permit any further use of the streets for a similar purpose for a period of twenty-five years, why not for a hundred years, or in perpetuity? Was such the legislative intention? If so, we fail to discover it, either in the express terms of the statute, or as arising therefrom by clear and necessary implication. * * *

"In view of the well established rules of strict construction to be given to grants of corporate power as against the public, we are constrained to hold that the city council of Cincinnati had no authority, at the time of the passage of the ordinance of 1841, to give to Conover the exclusive right to use the streets of the city for the purposes therein expressed, and that the defendant could therefore acquire no such right by the assignment of his contract."

In the case of *Jackson County Horse Car. Co. vs. Interstate Rapid Transit Co.*, 24 Fed., 306-7-8-9, the question involved was as to the power of the city of Kansas City in the state of Kansas to grant to the complainant the sole right, for twenty-one years, to construct, maintain and operate a railway over and along all of the streets in the city, under the general powers conferred upon such city. Judge Brewer delivering the opinion, said:

"(1) The legislature has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant special privileges; (2) it may, with similar limitations, grant the like power to municipal corporations as to all matters of a purely municipal nature; but, (3) as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not also probable corresponding benefit to the public. Hence the familiar rule that charters, grants of franchises, privileges etc., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or as is often epigrammatically said, a doubt destroy the grant.

"Now, coming closely to the question, the legislature has not *in terms* given to the city the power of granting an exclusive privilege of occupying the streets with railroads; it has not *in terms* given it the right to contract away its continuous control of the streets, and its future judgment of the needs of the public in those streets, to individuals for a series of years. Indeed, it has not *in terms* made any specific grant in respect to the occupation of streets by railroads, and their operation thereon.

"Upon what, then, can it be claimed that the city has the power to give to an individual the right to occupy the streets with railroads, secure him that right for a term of years, and also the right of debarring, during such term, every other citizen from a like use of the streets? Under the authority that the city might permit a street railroad, and that the legislature had granted the city a general control and supervision of the streets, it was held that the city could permit the use of the streets with such road, but power to permit one citizen to use the streets in a given way is a very different thing from power to give such citizen the right to keep every other citizen from a like use of the streets. The one is a mere street regulation—a license; the other rises into the dignity of a contract—a franchise. The one may rest upon the ordinary powers of street management and control, the other *requires* the support of a special grant. * * *

"Power to grant all facilities for transacting business does not imply power to forbid all others from transacting like business. Even where a charter is granted by the legislature directly, it grants no exclusive right, unless the exclusiveness is expressly named. * * *

"Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named."

In the case of the *Saginaw Gas Light Company vs. City of Saginaw*, 28 Fed., 529-534, which involved the question of the power of the city of Saginaw to grant an exclusive franchise, the court said, quoting from Dillon's work on Municipal Corporations:

"A municipal corporation possesses and can exercise the following powers and no other: First, those granted in express words; second, those necessarily or fairly implied, or incidental to the powers expressly granted; those essential to the declared objects and purposes of the corporation, not merely convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void."

In the case of *Grand Rapids E. E. L. Co. vs. Grand Rapids*, 33 Fed., 659-670-671, which was an action involving the power of the city of Grand Rapids to grant an exclusive franchise for a limited period under delegated power from the legislature, the court said that the ordinance passed was a contract, and further:

"So far, therefore, as this court is concerned, its action in sustaining or overruling the present motion, or in dissolving or continuing in force the injunction restraining the defendant corporation from using the streets of Grand Rapids under the ordinance of May 20, 1887, depends upon the questions above stated, i. e. whether the common council, under the city's charter, had the power to grant the complainant the *exclusive* right of using the streets of the city for the purposes aforesaid. It is conceded that in the charter of Grand Rapids, in force when said ordinance of 1880 was passed, there is no *express* power or authority conferred upon the common council to make such a grant of *exclusive* rights and privileges in, to, or over the streets of the city. The authority for the making of this exclusive grant must, therefore, as complainant's counsel properly admit, be found and sustained, if at all, upon what are called the *implied* powers of the common council. It is too well settled to need the citation of authorities in its support that municipal corporations, which are mere political agencies of the government, forming but parts of the machinery employed in carrying on the affairs of the state, possess and can exercise *only* such powers as are 'granted in *express words*, or those *necessary* or *fairly* implied in or incident to the powers expressly conferred, or those *essential* to the declared objects and purposes of the corporation, not simply convenient, but *indispensable*.' Implied powers, says Judge Cooley, 'are such as are *necessary* in order to carry into effect those expressly granted, and which must therefore be presumed to have been within the intention of the legislative grant.' The courts of the country, state and federal, have not been disposed to extend or enlarge the power of municipalities by implication; on the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations, that 'the reasonable presumption is that the state has granted, in clear and unmistakable terms, all that it has designed to grant at all.'"

On page 668 the court further says:

"When it is considered that corporations, public or private, are creatures of the legislative department of government, existing solely and alone by virtue of the sovereign will, and exercising *only delegated authority* of the state, the strict rule of construction applied to their powers is manifestly the correct one. This principle necessarily follows from the relation corporations occupy to the state. A municipal corporation is not a 'regnum in regno,' but an instrumentality, established by legislative enactment, to which certain powers of action are given for defined public purposes. The corporation may, through its proper officers, perform all acts or make all such contracts and incur all such liabilities as come legitimately within the powers conferred upon it; but all acts and contracts beyond the scope of the

powers granted are void. These fundamental principles lie at the foundation of the law relating to all corporations.

"Before applying these general principles and rules for the construction of the *delegated* powers granted to corporations, whether public or private, it is proper to call attention to the fact that municipalities do not ordinarily or usually possess exclusive control over their streets; on the contrary, it is well settled by authority that the streets of a city are *public highways*, which it is the province of the government, by appropriate means, to render safe and convenient for the use of the public."

And on page 669:

"It is also well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires and poles, * * * for public and private use, is not an ordinary business in which any one may engage, but is a *franchise* belonging to the government, *the privilege of exercising which can only be granted by the state or by the municipal government of the city, acting under legislative authority.*"

And on page 670:

"To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same.* Nothing short of the *whole sovereign power* of the state can confer *exclusive* rights and privileges in public streets, dedicated or acquired for public use, and which are held in *trust* for the *public at large.* * * * If the charter powers of the city have invested it or its common council with the *whole sovereign* power and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was ultra vires, and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city."

In the case of *Logansport Ry. Co. vs. City of Logansport*, 114 Fed. R., 688, there was involved the question of the power of the city of Logansport to grant to the complainant, a street railway company, a franchise in perpetuity, the statutes of the state providing for the incorporation of street railway companies in perpetuity, and expressly recognizing the exclusive control of the common council of incorporated cities over the streets, highways, alleys and bridges within the corporate limits of such cities, and requiring street railroad companies to ob-

tain the consent of such councils to the location, survey and construction of any street railroad through or across the public streets of any city before commencing construction. The city council of Logansport adopted an ordinance, granting to the complainant the right to lay and construct a single or double track for a street railway in and along the streets and bridges of the city of Logansport and to occupy, maintain and use, and to operate thereon railway cars, etc., in perpetuity, and in passing upon the validity of this ordinance the court says, on page 691:

"The statutes of this state confer exclusive authority, jurisdiction and power over all streets, highways, alleys and bridges within the corporate limits of cities in this state on the common council. In *Eichels vs. Street Railway Company*, 78 Ind., 261; *41 Am. Reports*, 561, it was held that the authority to lay the tracks and operate a railway on the streets of the city can only be conferred by a statute in express words, or by language from which such power must be necessarily implied. Such a power, it was said, is an extraordinary one, and one which cannot be implied from the charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporation. Hence the sole power possessed by the city of Logansport to grant an exclusive and perpetual right to the complainant to occupy and use such streets of the city for street railway purposes as it might from time to time elect, depends upon the acts of 1861 and 1891 above mentioned. We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the city of Logansport any such power? * * * * * * * * * *
It is manifest from a reading of the above mentioned statutory provisions that the legislature has not conferred, in explicit and express words on the city of Logansport the power to grant to a street railway either an exclusive or a perpetual use of its streets for railway purposes. The act of 1861 simply provides that a street railway shall first obtain the consent of such common council to the location, survey and construction of its railroad before the construction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens Street Ry. Co. vs. Detroit Ry. Co.*, 171 U. S., 48; 18 Sup. Ct. R., 732; 43 L. Ed., 67, the question for decision was whether the legislature of Michigan had conferred power on the city of Detroit to grant to the street railway company the exclusive use of its streets. * * * * * *

The court says: 'It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes.' And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891 above mentioned does not explicitly and directly confer the power on the common council of the city of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes.

"The court further says: 'There were many reasons which urged to this; reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust—and those which without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges.' And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise. That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

"The power to grant the use of its streets in perpetuity not having been granted to the city of Logansport in explicit and express words, is it granted by a necessary implication?

"The Supreme Court in the above cited case, further says:

'Mr. Justice Jackson in *Grand Rapids E. L. & P. Co vs. Grand Rapids E. E. L. & F. G. Company* (C. C.), 33 Fed. R., 659 says: * * *—'That municipal corporations posses and can exercise only such powers as are granted in *express words* or those *necessarily* or *fairly* implied or *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible.*' This would make 'necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocation an inevitable necessity, we need not stop to remark, or, if it means less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any con-

stitution not prohibiting it—and the power to prescribe the terms and regulations of the occupation derived very little, if any breadth, from the expression of it.'

"But assuming that the power 'to give consent upon such terms and conditions as the common council may see fit,' found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity.

"The Supreme Court further says: 'Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or if inferred from other powers it is not enough that the authority is convenient to them, but it must be indispensible to them.' Can it be successfully contended that the perpetual use of the streets of a city is indispensible to their use for railway purposes? * * * But the grant is open to a more serious objection. It was *ultra vires* of the common council to surrender its control of the streets of the city to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes, consistently with public safety and welfare is a power incapable of absolute alienation by the common council. By those ordinances the common council had undertaken to surrender this power and to remit it to the uncontrolled election of the complainant. * * * But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all of the streets of the city, however injurious it may be to the public convenience, safety or welfare. The public convenience, safety and welfare in this regard are surrendered to the complainant. * * * Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to his charge, to be administered in the interests of the public and not for the private advantage and gains of railway or other corporations."

We have quoted thus fully from the opinion in the above case because the facts therein are so similar to the case at bar. The city of Des Moines, in the ordinance of 1866, if the decision of the Circuit Court is correct, has granted to the railway company the right to enter upon any street of the city of Des Moines, build its tracks thereon whenever it may so elect, and this right is granted in perpetuity. The

only modification of the ordinance is found in the ordinance passed on the 8th day of March, 1890, (Exhibit No. 102, p. 216-217) in which it is provided, in Section 2 thereof, as follows: "Provided that hereafter in laying its tracks on parallel streets the same shall not be laid nearer together than two blocks, unless the city council shall consent thereto." In other words, if the ordinance of 1866 is a valid and binding contract, the Des Moines City Railway may enter upon any street of the city of Des Moines, except such as are within one block of streets upon which they already have tracks, and they may construct thereon their tracks and maintain and operate them, and this they may do forever and forever. In the words of the opinion in the Logansport Railway case above cited, "such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld."

In the case of the *Citizens St. Ry. Co. vs. City Ry. Co.*, 64 Fed., 647-9, which was an action involving the power of the city to grant a franchise in perpetuity, Judge Woods said, page 649:

"It is not a question of perpetuity or irrevocable right. If it were, different rules of construction would prevail. No presumption or inference could be allowed in favor of a perpetual right, and every reasonable intendment against it should be indulged."

In the case of the *Cleveland Electric Ry. Co. vs. City of Cleveland*, 137 Fed., 111, which involved the power of the city of Cleveland to grant a franchise and extensions of the same and the question as to whether or not a franchise can arise by implication, the court said, page 122:

"The public cannot be held to have parted with its fundamental rights except by clear and explicit language, or by implication equally clear. This rule of law is thoroughly established and must not be relaxed. It is essential to the preservation of the rights of the people for whose benefit legislatures and municipal councils are created, and public service corporations permitted to exist. * * *

"In the state legislatures, under the sanction given and limits set by the constitution, is reposed the sovereign power of the state. Some of the power it has delegated to the municipal council. A fragment of its authority, which it may at any moment recall, it has turned over to the council of the city of Cleveland. * * * Now, this delegated sovereignty reposed in the municipality by the state is to be exercised by the agent with no less care than if exercised by the sovereign it-

self. It is true, as urged by counsel, that the city council has plenary power, subject only to certain well-defined limitations; but it is not to be therefore said that, having plenary power, that power may be exercised in any other than the method provided by law, or that it may be assumed to have exercised it when the fact does not *clearly* appear. The council is not merely representative of the people who elect it. It is also the representative of the sovereign. Restrictions are vain if the checks put upon the methods of municipal legislation are not to be respected when they deal with fundamental rights. The rule that obligations arise or rights are granted by mere implication depends upon the nature of the parties, and the character of the obligations and rights. It is a very easy thing for a man competent to contract to have his rights determined by the just implications from his acts. He may find himself parting possession with his property even when he did not intend to do so. But this is all but impossible with a municipal corporation. Indeed, a municipal corporation, through its council or officers, may some times make strenuous effort to part with its property or with public rights, and fail in the effort. * * * But to say that a municipal corporation, the delegate of sovereignty, has parted with one of the powers of sovereignty by *implication*, is to assume that which, while not impossible, can only be supported by the strongest proof, and by an implication so cogent as to be quite as *impressive* and *conclusive* as if the grant had been made in express terms."

The court, quoting with approval from the language of Railroad Company vs. Canal Commissioners, said:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so that we will never believe it to be meant when it is not said."

On page 125, the court said:

'When the matter is susceptible of such easy expression in the English language, it might well suppose that if, by an ordinance, it was intended to fix a period for a franchise, it could be done in unmistakable terms. There is no need of concealment in such cases, and no need for implication."

On page 126, the court said:

"But after all, the conclusively satisfactory answer is that it is intolerable to think that instead of using direct, explicit, and easily framed language to grant a great right which only the sovereign can grant, it may be conveyed by an implication to be raised by a process of reasoning which the lay mind has difficulty in comprehending, and which it could hardly discern at all if not pointed out, and that this implication may be so derived from apparently innocuous and insig-

nificant words lost in the mazes of an ordinance of relatively small consequence. Fundamental powers of the sovereign to be used by a delegated body, naturally untrained in the law's learning, and rigidly rstricted in its use, are not to be so exercised."

In *Wright vs. Nagle*, 101 U. S., 791-96, which involved the power of the inferior court of Floyd county to grant a franchise exclusive in character, the court said:

"Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from the legislature its power will always be construed most strongly in favor of the state. These are elementary principles. The question here is whether the legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the state to establish such ferries and bridges in a particular locality, as the ever-changing wants of the public should, in the progress of time, require. In our opinion, it did not. It gives these courts the right to establish ferries or bridges but not to tie the hands of the public in respect to its future necessities."

In the case of *Minturn vs. Larue*, 23 Howard, 435, which involved the authority of the city of Oakland to establish and regulate ferries, and to grant an exclusive franchise, the court said:

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In the case of *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550-561, which involved the construction of an act of the legislature granting power to the complainant company to dig and mine rock in the territory described, the court said, by Mr. Justice Harlan:

"If the act of 1876 is fairly susceptible of either of the constructions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of the property, franchises or privileges in which the government or the public has an interest."

In the case of *Detroit Citizens St. Ry. Co. vs. Detroit Ry. Co.*, 171 U. S., 48-53-54, in which the controversy turned upon the power of the city of Detroit over its streets, whether original under the con-

stitution of the state, and hence as extensive as it would be in the legislature, or whether not original but conferred by the legislature, and hence limited by the terms of the delegation, the Supreme Court, through Mr. Justice McKenna, said:

"Did it (the city) get such power from the legislature? It is contended that it did by the act under which the Detroit City Railway Company, the predecessor of plaintiff in error, was organized, and to whose rights and franchises it succeeded. This act is the Tram Railway Act. * * * 'All companies or corporations formed for such purposes (railway) shall have the exclusive right to use and operate any railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.' * * *

"It is clear that the statute did not *explicitly and directly* confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language *explicit* and *express*, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

On page 54, the court further said:

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapids, etc., Power Co. vs. Grand Rapids Co., says: 'That municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensible.* This would make necessarily implied mean inevitably implied."

Then quoting from an opinion by Judge Lurton as follows:

" 'A necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that, which is imputed to the testator, cannot be supposed.' * * *

"But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege or occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one, contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it which is the test of the cases. The rule is one of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. *Consequently*, those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In the case of *Railway Co. vs. Philadelphia*, 101 U. S., 528-39, which was an action involving the construction of a grant to the Railway Company, the court said:

"Charters of private corporations duly accepted, it must be assumed, are, in general, executed contracts; but the different provisions, unless they are clear, unambiguous, and free from doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as are applied to other legislative grants; the usual rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms."

In Cooley on Constitutional Limitations, 7th Ed., page 296, the author says:

"A municipal corporation having power, under the charter, to estab-

lish and regulate streets, cannot, under this authority, without *explicit* legislative consent, permit individuals to lay down a railway on one of its streets and confer privileges *exclusive* in character and designed to be *perpetual* in duration."

In Dillon on Municipal Corporations, 4th Ed., Section 91, regarding the power of municipal corporations, the author says:

"*Principles of Construction.* Extent of the powers of municipalities, whether express, implied or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or, * * * any common law right of the citizen or inhabitant."

In Section 695, the author says: "Exclusive legislation has been sustained when not in conflict with the constitution of the state, though in some cases it has been denied.

"However it may be as respects the power of the legislature, in a particular state, to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary, or at least reasonable, implication."

After the adoption of the amendment to the ordinance of December 10, 1866, passed March 8th, 1890, (record pages 9 and 10), the Twenty-third General Assembly passed an act, Chapter 11, which became effective by publication April 30, 1890, in which it is provided that:

"All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled, including animal, electric, steam or other power, whether now known or hereafter utilized.

"Section 2. All ordinances or resolutions of such cities or incorporated towns heretofore enacted granting to any person or company

the right to propel its cars by electricity are hereby declared legal and valid."

At the time of the adoption of Chapter 11 of the Acts of the Twenty-third General Assembly, Code Section 464 of the Code of 1873, heretofore quoted was in force. This gave municipalities the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places.

The act of the 23d General Assembly above referred to gave the municipality the additional power to that already possessed by it to define the motive power by which the street railway receiving and accepting any franchise granted could be operated, and by section two of the chapter validated the amendment to the ordinance of Dec. 10, 1866, passed March 8th, 1890, by which the company was granted the right to use electricity or other practical motor power.

The sections of the statutes heretofore quoted, and to which attention has been called, are all of the provisions of the statutes of the State of Iowa in which power is granted to cities of the first class in respect to the matters under consideration, and we submit that under such provisions the city did not possess the power requisite to make a grant unlimited as to time or in perpetuity as claimed by the complainant. The great weight of authority is clearly to the effect that without an express grant of power so to do municipalities cannot grant franchises which are exclusive or in perpetuity. The power must be granted in explicit terms and cannot be implied from other powers granted.

If it should be held that the city had the power to grant the franchise in perpetuity, and the franchise of 1866 was a grant unlimited as to time, the effect would be to give the Des Moines City Railway Company an exclusive franchise in perpetuity.

The location of the tracks now owned and operated by the Des Moines City Railway Company in the city of Des Moines is shown by the maps, exhibits "A'" "B," "C," "D," "E" and "F." (Record, pages 678-679.)

Exhibit "F" shows the location of the tracks as they existed on the 21st day of December, 1905. (Record 531.) The testimony of J. W. Budd, former city engineer of the City of Des Moines, (Record

373) shows the location of the business district of the city, bridges over the Des Moines River, width of the streets of the city, and the condition of the streets leading from the business district to the residence portion of the city with reference to grades, etc. From this map, Exhibit "F" and the testimony of J. W. Budd, it appears that every street in the business portion of the city, both in East and West Des Moines, and every bridge, on every street in the business portion of the city is occupied by the complainant's street railway tracks, except a portion of West Third and Eighth streets. The grade on Eighth street north of Center, renders its use for street railway purposes impracticable. Tenth and Eleventh streets are open but for a short distance, Tenth street ending at Pleasant and Eleventh at Grand avenue.

All of the east and west streets in the business district are occupied by the tracks of the complainant company, and no other street railway company could reach any point near the business center of the city without the consent and permission of the complainant, and the power of this company to exclude any other street railway company from reaching the business center of the city gives it a practical monopoly, and if the rights of the complainant, as claimed by it, are sustained this monopoly would be in perpetuity.

A franchise exclusive because of existing conditions is just as vicious as a franchise exclusive by its terms.

In the case of *Flynn vs. Little Falls E. W. Co.*, 77 N. W. 38, referred to above, the court said:

"While the ordinance on its face does not purport to grant any exclusive franchise, yet the practical effect is almost necessarily to give the grantees a monopoly for thirty years of the business of furnishing water to the city and its inhabitants. * * * Hence whatever improvements may be made in the future in the methods of supplying the public with water, in the quality of water supplied or in the method of fire protection, the city and its inhabitants are tied down by this ordinance to the present system, and practically confined to the supply furnished by the company for thirty years."

A practical monopoly carries with it the same evil effects as a monopoly granted in terms. The complainant has so conducted its business by laying its tracks in the city of Des Moines on every available street leading from the business district of the city to the

residence portion thereof that it has made it possible for it to exclude all competitors, or to dictate the terms on which they shall compete. If it holds a perpetual franchise, it also holds one exclusive in effect, and the city must depend upon it for street railway service for all time.

It has always been the policy of the State of Iowa to prohibit the granting of franchises or special rights and privileges in perpetuity.

Section 12, Article 8 of the Constitution of Iowa, provides, that subject to the provisions of the article:

"The General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, * * * and no exclusive privilege except as in this article provided shall ever be granted."

It is further provided by Section 1619 of the Code of 1897, Section 1090 of the Code of 1873, that:

"The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted, or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good."

This section was adopted in 1873, at the same time that Section 464, granting to the municipalities the right to authorize or forbid the operation of street railways over its streets, alleys and public places.

From these provisions it will be seen that it has been and is the policy of the State of Iowa to prohibit the granting of special or exclusive privileges or immunities, and all franchises so obtained may be altered or abridged or set aside by law at any time.

This question has been passed upon in many cases, prominent among which is *Sioux City Street Railway Company vs. Sioux City*, 78 Iowa, 368, which involved the question as to whether or not a franchise granted to the Street Railway Co., requiring it to pave between its rails only, was impaired by a further requirement to pave an additional amount of the street outside the rails; and in the

case between the same parties in the same volume, on page 742, the same question was involved; the company contending: (1) that the ordinance, upon its acceptance of the provisions thereof, became a contract between the parties; (2) that, as by the express provisions of the contract it was required to pave the space between the rails, the necessary implication was that it should not in the future be subjected to any burdens in addition to that growing out of the paving of the streets; and that such provision is as certainly a part of the contract as though contained therein in express language; and (3) that the subsequent legislation by which the additional burden is sought to be imposed upon it is an impairment of the obligations of the contract, and consequently is void.

The Supreme Court said, in the latter case, on page 745:

"In our opinion the case turns upon the question whether the state had the right, under its reserved powers, to impose the additional burden upon the plaintiff. When the plaintiff became incorporated, the following statute was in force: 'The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control and may be at any time altered, abridged or set aside by law, and any *franchise* obtained, used or enjoyed by such corporation may be *regulated, withheld* or be subject to conditions imposed upon the enjoyment thereof whenever the General Assembly shall deem necessary for the public good.' Code Section 1090. The section occurs in the chapter relating to corporations for pecuniary profit, to which class of corporations plaintiff belongs.

"That the state in granting a charter to a corporation, may reserve to itself the power to repeal or amend the same, and that it may exercise such reserved power, is well settled. (Citing cases.) By the provision quoted above, the state reserved the power, not only to repeal or amend the articles of incorporation of such corporations as should be organized after its enactment, but to impose such conditions upon the enjoyment of the franchises obtained thereunder as the General Assembly might deem necessary for the public good. Plaintiff's franchise consists in the privileges, powers and rights conferred upon it by the general statute and its articles of incorporation, but it assumed them subject to the right and power reserved to the state by the statute. The reservation was a condition of the grant."

In the case of *Mayor of Houston vs. Houston City Ry. Co.*, 19 S. W., 129, where one of the questions involved was as to the right of

the City of Houston to grant a franchise for street railway purposes in perpetuity, the court said that while the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination, and said:

"They could not, perhaps, abandon or transfer their ordinary control over the streets of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office. * * * *Nor was it in the power of the common council to create a perpetuity.* Subject to these limitations, however, the wisdom and reasonableness of the grant, and the length of time during which it should continue, were addressed solely to the good judgment of the members of the common council."

In the case of *Flynn vs. Little Falls Electric & Water Co.*, 77 N. W., 38-9, where the common council of the city had the authority to make a contract for the water company to pay an agreed price for the supply of water to the city, and for fire protection, the court said:

"We have no doubt as to their power to contract with this or any other water company with reference to furnishing the city and its inhabitants with water; and in as much as it might be impossible to induce any individual or corporation to expend the necessary capital to construct a water works in a small village or city without assurance of patronage by the municipality itself for some definite amount and time, we have no doubt of the power of the village or city council to make a time contract with a company for supplying the city with water for fire protection, providing the same is reasonable. * * *

"But the power of municipal authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away control or embarrass their legislative or governmental powers, or render the municipality unable, in the future, to control any municipal matter over which it had legislative control. Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, although they may not have chosen the best method or made the most advantageous contract; but this is not an unlimited and arbitrary discretion to make any kind of a contract they see fit, as the court below, in its memoranda, seems to think. If it is, the City Council might have made a contract running one hundred or even five hundred years, as well as thirty years. This would be a very dangerous doctrine, for, by reason of the incompetency or dishonesty of these officials, the power of a municipality might thus be bartered away for a long period of time, for so long a period of time as to practically disable it from performing its public duties."

The court held the ordinance was void.

In the case of the *Marshalltown Light Co. vs. Marshalltown*, 127 Iowa, 637-640, which involved the power of the city to require the Street Railway Company to pave the street outside its rails, when by the terms of its contract with the city it was only required to pave between the rails, where there was an express exemption in the contract or ordinance that the Railway Company should not be required to pave except between the rails, the court held that Section 1619 of the Code of 1897, (Section 1090 of the Code of 1873), became a part of the contract, and gave the legislature and municipality authority to regulate, withhold or subject to conditions the franchise granted by the contract.

In the case of *Thrift vs. Elizabeth City*, 122 N. C., 31; 44 L. R. A., 427-9, which involved the power of the city to grant a franchise in perpetuity for the supply of water to the city under the Constitution of the state, which provided that perpetuities and monopolies are contrary to the genius of a free state and ought not to be permitted, the court said:

"A monopoly need not be a perpetuity, nor is a perpetuity necessarily a monopoly, but both exist either jointly or severally within the constitutional prohibition. There can be few, if any, monopolies more dangerous in their tendencies, and unjust and harmful in their results, than those that pertain to municipal corporations. In the present age of activity in scientific research, and wonderful development in mechanical inventions and discoveries, it is highly improbable that any present system will long remain the best. Improved methods and cheaper appliances will result, and yet the town would deliberately surrender to a private individual its highest attributes of delegated sovereignty, and would place beyond its power for nearly a generation all opportunity for securing for its citizens the benefits and improvements of a progressive age. * * * The courts might afford relief, but it is the better public policy to encourage competition instead of fostering monopolies, and thus, as far as possible, avoid the necessity of judicial interference."

In the case of the *Grand Rapids E. E. L. & P. Co. vs. Grand Rapids E. L. & F. G. Co.*, 33 Fed., 659-672, which involved the power of the city of Grand Rapids to grant an irrepealable ordinance for a limited time for the use of the streets for wires and poles for electric light, the court held that the contract was ultra vires and void, and said, page 672:

"Looking at the question of legislative intent from another standpoint, we find that it is not the policy of the state of Michigan to grant

irrepealable franchises and privileges to private corporations. Article 15, Section 1, of the state constitution provides that, 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be *amended, altered or repealed.*' Now, by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the state, has secured not only an exclusive franchise belonging to the city, but an irrepealable privilege such as the legislature could not have conferred. Is it to be presumed that the legislature, under its constitutional authority 'to confer upon incorporated cities such powers of a local, legislative and administrative character as they may deem proper,' intended to invest the common council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city, and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment, or repeal—rights which the legislature could not itself have directly conferred. If such a presumption is proper, the conclusion is reached that the agencies or creatures of the state may, in the exercise of derivative and delegated powers, do what the legislature itself could not. This would violate the well-settled rule that the legislature cannot do indirectly, through the local government, what the people have by their constitution restricted it in doing directly."

In the case of *Sioux City Ry. Co. vs. Sioux City*, 138 U. S., 98-107-108, the Supreme Court of the United States sustained the Supreme Court of the State of Iowa in the cases decided and referred to in the 78 Iowa, and said:

"The company took its franchise subject to such legislation as the state might enact. This is plain from the provision of Section 1090 of the Code. The company took its charter subject to the provisions of that section."

"It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company. Under Section 1090 of the Iowa Code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of the franchise (amend or withhold)which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the General Assembly."

In the case of *Hamilton Gas Light Co. vs. City of Hamilton*, 146, U. S., 258-69, which involved the power of the city of Hamilton to amend or revoke the charter of the Gas Light Company, the Supreme Court said:

"By the constitution of Ohio, adopted in 1851, it was declared that 'no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly;' that 'the General Assembly shall pass no special act conferring corporate powers,' and that 'corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.' If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gaslight to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate. * * * The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

In the case of *Schurtz vs. Cook*, 148 U. S., 397-410-411, which involved the power of the legislature to amend a franchise constituting a contract, where the constitution of the state of New York reserved to the state the power to alter, change or repeal all such general laws, and that the charter of every corporation that should be granted by the legislature should be subject to alterations, suspension or repeal in the discretion of the legislature, the court said, after approving the doctrine laid down in the case of *Hamilton Gas Light Co. vs. City of Hamilton*, 146 U. S., 258, that the grantee of the franchise took the same subject to the limitations imposed either by the constitution or the general law of the state.

IV.

THE ORDINANCE OF DECEMBER 10, 1866.

If the court should find that under the provisions of the constitution and under the legislative acts existing at the time the ordinance of December 10, 1866, was enacted, or at the time of its re-enactment

in 1874, the respondent city had been delegated the power to grant a permanent and perpetual franchise or contract for the use of the streets, alleys and public places for street railway purposes, the next question for the court's consideration and determination is as to the complainant's rights under the ordinance of December 10, 1866, and including the subsequent amendments thereto.

The sections of that ordinance which are material to this inquiry are:

"Section 1. That consent, permission and authority is hereby given and granted to, and duly vested in the Des Moines Street Railway Company and their successors and assigns to lay a single or double track for passenger railway lines * * * upon and along all the streets * * * and over the bridges and on such streets in the city of Des Moines, with their present and future extensions and connections, and authority is hereby given said company, their successors and assigns, to keep, maintain, use and operate thereon railway cars in the manner, *and for the time*, and upon the conditions hereinafter mentioned and prescribed. (Record, p. 18.)

"Section 10. The rights herein granted to said company to operate said railway shall be exclusive for the term of thirty years from the time the first mile of said track is laid and cars running thereon, and the said City of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to said company." (Record, p. 20.)

"Section 14. Within thirty days from the publication of this ordinance, said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed * * *." (Record, p. 22.)

The complainant claims that the grant contained in Section 1 of the ordinance of December 10, 1866, was unlimited as to time and perpetual, and by reason thereof, it is vested with the right to lay a single or double track for passenger railway lines—upon and along all the streets —and over the bridges and on such streets in the City of Des Moines, and that it has the authority to keep, maintain, use and operate thereon railway cars for all time to come; and that in addition to such grant, the rights conferred were to be exclusive for operation by animal power for thirty (30) years.

The respondent claims that by the granting clause of this ordinance, the grantee, and its successors in interest, were given the right "to lay a single or double track for passenger railway lines—upon and

along the streets—and over the bridges and on such streets in the city of Des Moines, and that authority was given the company and its successors in interest, to keep, maintain, use and operate thereon railway cars in the manner and for the time and upon the conditions hereinafter mentioned and prescribed." That the granting clause makes reference to the time thereafter mentioned in the ordinance, which grant is referred to in Section 10 of the ordinance, which provides, "the rights herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon; and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair and destroy the rights and privileges herein granted to said company."

The first mile of track was completed and cars running thereon on the first day of January, 1868, and the thirty-year period referred to in the ordinance, therefore, expired January first, 1898.

(Opinion of the court, record page 38. Decree in *Des Moines Street Railroad Co. vs. City of Des Moines*, paragraph 10 of the bill, record p. 5. Evidence of M. P. Turner, record, p. 455.)

The ordinance contains a number of other sections, but only in Sections 1 and 10 is the term or duration of the rights granted mentioned or referred to in any way. Certain rights and privileges were granted to and vested in the company and its successors in interest by Section 1. Section 10 says, "the rights herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid.' In Section 1, the company is given the right to operate its railways on the tracks laid down by it in the streets of the city; and if Section 10 of the ordinance is construed to apply only as a limitation as to the time of the exclusive feature of the contract, it would mean that the company could operate its own railway exclusively for thirty (30) years. This, the company would have a right to do under a general grant to occupy the streets with street railway tracks. The company wanted something in addition to that privilege, for such an exclusive feature would be of little or no value. It wanted the city placed in a position where it could not give to some other person or corporation the right to lay down tracks and operate cars on streets not occupied

by the company, for without such a prohibitive provision, it would have competition, and competition was a thing it was seeking to avoid. To effectually foreclose the city in this respect, the further clause was added to Section 10 of the ordinance: "And the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to said company."

This gave the company a contract from the city whereby it would not grant to some other person or corporation the right to lay street railway tracks on streets not occupied by the company, and to operate cars over the same. Without this clause, the city could have granted a like privilege or right to lay tracks and run cars on streets not occupied by the grantee company, provided, only, that the grantee company, or its successors in interest in the ordinance of December 10, 1866, did not at the time occupy the street. The city, by the last clause of Section 10, was prohibited from granting any privilege that would impair or destroy rights or privileges granted in the ordinance of December 10, 1866, for the period of thirty (30) years. This was a definite and fixed term, and after the expiration of such definite and fixed term, the city had the right to grant any right or privilege that would impair or destroy the rights and privileges contained in the ordinance of December 10, 1866; so that, in accepting the ordinance, the grantee company and its successors and assigns took the same with the provision that the city at least had the right, after the expiration of thirty (30) years from the completion of the first mile of track and the running of cars thereon, to grant to some other person, firm or corporation such rights and privileges as would destroy and take away all of the rights contained in the ordinance.

While it is true that Section 10 does not refer back to Section 1 in specific terms, Section 1 does refer to some subsequent section as fixing the time the rights and privileges granted shall endure, for it says that the rights and privileges are granted *for the time*—hereinafter mentioned, and Section 10 is the only subsequent section of the ordinance mentioning the duration of the grant of the rights contained in the ordinance.

Ordinances or contracts making grants are construed so that all parts of the instrument are to be read together and taken into account in arriving at the proper interpretation of the grant. Applying this rule, Section 1 grants the rights and privileges for the time hereinafter mentioned. This is an unequivocal reference to some section of the ordinance which follows, wherein the duration of the grant of the rights and privileges is mentioned and prescribed. Section 1 does not purport to name the term of the grant, but in precise words says that it is for the time mentioned in some succeeding section, and the succeeding section wherein the duration of the grant of the rights and privileges is mentioned is Section 10.

Section 14 of this ordinance provides that, "Within thirty days from the publication of this ordinance, said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, etc." From this section, it will be seen that the company accepted the ordinance with the full knowledge that certain limitations were expressed in it. Certain conditions were named in the ordinance and certain regulations were made for the laying down of the tracks and operation of the cars, and certain limitations were made as to the duration of the grant. If the duration of the grant were unlimited as to time, and the exclusive privilege granted in Section 10 was the only limitation contained in the ordinance, Section 14 would have provided that the acceptance must be by the company with the conditions, regulations and limitation (singular) above expressed; but it must have been clear in the minds of the city council, when the ordinance was passed, that there were two limitations, one limitation referring to the general grant as a grant, and the other referring to the term or duration of the exclusive or prohibitive feature of the grant. If this were not true, this portion of the ordinance is meaningless.

There were a number of conditions mentioned in the ordinance, subject to which the company was compelled to take the grant. There were a number of regulations which the company had to accept, and there were two limitations placed in the ordinance which the company was required to accede to before the grant would become in full force and effect, and these limitations are those above referred to.

If it could claimed that on account of the language used in the ordinance of December 10, 1866, there was any uncertainty, doubt or ambiguity in reference to the duration of the grant, or that it was uncertain in this respect, such uncertainty, doubt or ambiguity must be resolved in favor of the public and against the grantee, and no right or privilege can be obtained by presumption, inference or implication.

We have called the court's attention to many of the leading cases in the state courts as well as the Federal courts in reference to this rule, and also as to the text laid down by the most eminent authors in this country.

Judge Dillon, in his work on *Municipal Corporations*, Sections 89 and 91, says:

"A fundamental and universal rule, which is as reasonable as it is necessary, is that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or doubt as to the extent of the power is to be determined in favor of the state or general public, and against the state's grantee."

The Supreme Court of the State of Iowa has sustained this rule, and in the case of *Clark, Dodge & Co. vs. City of Davenport*, 14 Iowa, 484, says:

"It is a well-settled rule of construction of grants by legislatures to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. *Any doubt or ambiguity arising out of terms used by the legislature* must be resolved in favor of the public."

And in the case of *Keokuk Water Co. vs. Keokuk*, 80 Iowa, 137, the provision of the ordinance being:

"Section 1. That all the rights, privileges &c. * * * extended to and imposed upon the Keokuk Gas Light & Coke Company—are granted—for the term of twenty years from the 1st day of July, 1868.

"Section 2. The city of Keokuk, at the end of ten years from the date aforesaid, shall have the right, by giving the company twelve months' notice, to purchase all of the property, rights and privileges * * * of the company * * * at a fair valuation * * *. In case the city shall not make the purchase at the time aforesaid, it shall have such right at the end of each succeeding five years thereafter; and the said gas company shall continue to possess and en-

joy all the aforesaid rights and privileges, and subject to the same conditions and restriction aforesaid, until such purchase shall have been made."

On page 141, the court said:

"The first section declares in unmistakable language that the privileges granted to plaintiff are for the term of twenty years from July 1, 1868. If this section stood alone on this subject, it could not be claimed that plaintiff's privileges extended to a later date. Section 2, after providing how the city might purchase the works at the end of ten years, or at the end of each succeeding five years thereafter, provides that 'said gas company shall continue to possess and enjoy all the aforesaid rights and privileges, * * * until such purchase shall have been made.' Taking this provision alone, it is obvious that plaintiff's privileges were extended, not for twenty years, but until the city purchased at the time and in the manner provided. We are not at liberty to reject either of these provisions, but are to take the whole ordinance together, and to say therefrom what was intended by the parties in adopting and accepting the same. We assume that the language in both sections was employed purposely. To say that the privileges to plaintiff were extended without other limit than until the city should purchase the works, is to entirely ignore the twenty-year limitation in the first section. If the privileges to plaintiff were to extend until purchase was made, it was an idle use of words to say that it was for the term of twenty years.

"We think the purpose in following the provisions as to purchase, with the provisions that the gas company should continue to enjoy its privileges until the purchase was made, was to avoid any question as to the gas company's rights before a purchase was made, and not to extend the privileges beyond the twenty years named."

And in the recent case of *Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234, the court says:

"Grants or franchises in perpetuity or for unreasonably long periods of time are generally regarded as against public policy; and if ever valid, the authority therefor must be found in the constitution and statute of the state."

The first case decided in the United States Supreme Court on this subject is the case of *Charles River Bridge vs. Warren Bridge*, 11 Peters Report, 420, which involved the claim by the complainant that by implication, a franchise between itself and the state excluded the state from granting a similar right to another bridge company to erect a bridge. The court said:

Page 544:

"The rule of construction is well settled in such cases, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol., 793, in the case of *The Proprietors of the Stourbridge Canal vs. Wheely and others*, the court says: 'The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision."

On page 545, the court said:

"Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by *implication*, make the terms of a charter in one of the states more unfavorable to the public than an act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are *restraining*, within the *strictest limits*, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by *implication*; and construing a statute more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice. * * *

"In the case of the *United States vs. Arredondo*, 6 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court; and the principle recognized, that in grants by the public, nothing passes by *implication*."

On page 546:

"The same rule of construction is also stated in the case of *Beaty vs.*

The Lessee of Knowler, 4 Pet. 168, decided in this court in 1830. In delivering their opinion in that case, the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise being restrictive of individual rights cannot be extended beyond the letter and spirit of the act of incorporation.'"

On page 547, the court said:

"It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established: and it can never be assumed, that the government *intended* to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state *ought never to be presumed to surrender this power*, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment *ought not to be presumed* in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value, if by *implication and presumption* it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of *privileged corporations*. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

On page 549:

"The inquiry then is, does the charter contain such a contract on the part of the state? (Exclusive to erect a bridge.) Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must

be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiff in error contend for, and none can be *implied;* and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience and of advancing the public prosperity, by providing safe, convenient and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the state, unless it shall appear by plain *words* that it was intended to be done."

In the case of *Saginaw Gas Light Co. vs. City of Saginaw*, 28 Fed., 528-539, the court said:

"It is scarcely necessary to say that, in the jurisprudence of Anglo-Saxon communities, gifts of the sovereign are treated with less consideration, and a totally different rule of interpretation obtains. Nothing is better settled than that statutes creating monopolies, granting franchises, and charters of incorporation, must be construed liberally in favor of the public, and strictly as against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts. Whatever is not unequivocally granted in such act is taken to have been withheld. All acts of incorporation, and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies.

"In regard to the rights of franchises, it is said by the Supreme Court that, where the grant is designed by the sovereign power to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and *therefore the grant is not to be extended by implication, in favor of the grantee,* beyond the obvious and natural meaning of the words employed. Other authorities, putting it sententiously, say that a doubt is fatal to a grant."

On page 540:

"'A corporation is strictly limited to the exercise of those powers which are specially conferred upon it. The exercise of a corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and the spirit of the act of incorporation.' (Citing cases.)

"But it is useless to multiply authorities in support of this proposi-

tion. The general principle is too firmly established to admit of argument."

In the case of *Grand Rapids R. T. Co. vs. Grand Rapids E. L. Co.*, 33 Fed., 659-667, the court said:

"The courts of the country, state and federal, have not been disposed to extend or enlarge the power of municipalities by implication. On the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations, that 'the reasonable presumption is that the state has granted, in clear and unmistakable terms, all that it has designed to grant at all."

In the case of the *Oregon Ry. Co vs. Oregonian Ry. Co.*, 130 U. S., 1-26, the court said:

"It is to be remembered that where a statute making a grant of *property, or of powers, or of franchises*, to a private individual or a private corporation, becomes the subject of construction *as regards the extent of the grant*, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet. 420, 'in this court the principle is recognized that in grants by the public nothing passes by implication.'

"Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to the powers granted."

In the case of *Stein vs. Bienville Water Co.*, 141 U. S., 67-80, the court said:

"If the contract under which the plaintiff claims was doubtful in its meaning, the result would not be different; for, while it is the duty of the courts not to defeat the intention of parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that, 'in grants by the public nothing passes by implication:' and, 'if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.' (Citing the Binghampton Bridge case.) Guided by this rule, in respect to which there

is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different steam or river."

In the case of the *Central Transportation Company vs. Pullman Car Company*, 139, U. S., 24, the court said, page 49:

"By a familiar rule, every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention on the part of the government to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

In the case of *Knoxville Water Co. vs. Knoxville*, 200 U. S., 22-33-4-6-7, which involved the construction of the franchise granted by the city of Knoxville to the water company, where the franchise provided that the city "should not grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon public streets, lanes or alley, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, 1883;" also, "to pay said company for rent of seventy-five hydrants, hereinbefore stipulated to be erected, $50.00 each per annum, payable in quarterly installments on the last day of each quarter;" and, " to pay in addition to the annual rent of $50.00 as hereinbefore provided, and as an additional rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the state and the ordinances and resolution of the city, would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said water company within the corporate limits of the city of Knoxville," the question was as to

whether the city could erect a water plant of its own. The court said, page 32:

"The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional right of the Water Company, establish and maintain a separate system of waterworks of its own. * * *

"The principles which must control in determining the scope and obligations of the agreement of 1882 have been clearly outlined in our decisions. We may assume, for purposes of the present discussion, but without deciding, that the city of Knoxville was invested by the legislature with full authority, or that under its general municipal powers it could bind itself by contract, to give to a single corporation or company the *exclusive* right for a specified period to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the Water Company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.

"Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, 544, 547, 548, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract "'must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given by the act;'" that, "it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created;" and that those who insist that the government has surrendered any of its powers or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. "Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public." Such were the words of this court in *Turnpike Co. vs. Illinois*, 96 U. S., 63, 68. The universal rule in doubtful cases—this court said in *Oregon Railway Co. vs. Oregonian Ry Co.*, 130 U. S., 1, 26—is that " the construction shall be against the grantee and in favor of the government." As late as *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550, 562, this court said: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an in-

terest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell vs. Grandjean*, 111 U. S., 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

On page 37, the court said:

"It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers."

In the case of *Blair vs. Chicago*, 201 U. S., 400, which was an action involving the interpretation of the grants by the state of Illinois, to the Street Railway Company in the city of Chicago, the provisions of which are set out on page 464, the court, on page 463, said:

"We may premise, before taking up this act for detailed consideration, that it is a firmly established rule which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in *plain terms*, for nothing passes by the grant except it be clearly stated or necessarily implied.'

The court, on page 467, said:

"It is contended that unless the construction insisted upon for the companies is given to the act, no force or effect is given to the expres-

sion 'during the life thereof,' and a well recognized rule is invoked that all parts of this law must be given force and effect in interpreting its meaning. While it is incumbent upon those claiming under a public grant, as we have already stated, to make out the rights contended for by terms which clearly and unequivocally convey them, and it is enough to deny the privileges contended for, if, upon considering the act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred, we think this act can be given a construction which shall give some meaning and effect to the words 'during the life hereof.' * * * But if the meaning is in doubt, it must be resolved against the corporation and in favor of the public."

On page 469, the court said:

"It is not to be understood that the interpretation herein suggested frees the judicial mind from doubt as to the meaning of this act, any more than its ambiguous and contradictory phrases could have impressed upon the legislative understanding the meaning now contended for by the companies. It is the application of the settled rule of interpretation to such grants which invalidates the claims made for it, rather than any clear and satisfactory interpretation which has been suggested by counsel or arrived at by the court."

On page 471, the court further said:

"Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

The court quotes with approval from the case of the *Pennsylvania Railroad Company vs. Canal Commissioners*, 21 Pa. St., 9-22:

"Words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature."

" 'The just presumption,' says Cooley in his work on Constitutional Limitations, 7th Ed., p. 565, 'in every such case is that the state has granted in express terms all that it designed to grant at all. This is sound doctrine, and should be vigilantly observed and enforced.' "

On page 472, the court said:

"Concurrent with this principle (viz.: that laid down in the Dartmouth College case) and to be considered when construing an alleged grant of this character is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often cited case of *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, and has been uniformly applied in many subsequent cases in this court."

The court quotes with approval from the case of *Perrine vs. Chesapeake & Delaware Canal Co.*, 9 How. 177-192, as follows:

" 'The rule of construction in cases of this description * * * is this—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' "

The court also quotes with approval from the case of *The Binghampton Bridge*, 3 Wall., 51-75, and of the *Fertilizing Company vs. Hyde Park*, 97 U. S., 659, and says, on page 473:

"Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865, contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are hereby asserted, fail when they can only be maintained by strained construction in their favor."

The principle of strict construction, and that no right or privilege can be granted or extended by implication, inference, intendment or presumption, applies equally to the granting of powers to the municipality by the legislature, or the granting of franchises by the legislature, or the granting of franchises by municipal corporations.

In the case of *Long vs. City of Duluth*, 51 N. W., 913-4, the court said, on page 914:

"It is hardly necessary to advert in this connection to the fact that municipal corporations have only such powers as are conferred by the legislature; and the same principle of strict construction which forbids that a direct grant of a franchise by the legislature be construed as exclusive, is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies by the state to grant exclusive franchises or privileges must be explicit and free from doubt, as would be required if the franchise were created directly by the legislature."

In the case of *Jackson Co. H. Car Co. vs. Interstate R. T. Co.*, 24 Fed., 306, the court said. on page 309, after quoting from Dillon on Municipal Corporations to show that the legislative grant of authority is not exclusive:

"And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power?"

As has been shown in Division III of this Argument, the City of Des Moines has never had the power or authority to grant a franchise in perpetuity and to give to the ordinance of 1866 the construction that it is perpetual in terms would be to render the ordinance void. It is a familiar rule of construction of statutes and ordinances that where a statute or an ordinance can be given two constructions, one of which renders the statute or ordinance constitutional and valid and the other renders it unconstitutional and invalid, that construction will be adopted which will give force and effect to the ordinance. No citation of authorities is needed upon this proposition because it is supported not only by all of the cases but by common sense. If then the ordinance of 1866, is so ambiguous in its terms that it may be construed to be a grant either for thirty years or a grant in perpetuity the construction will be adopted that it is a grant for thirty years, since otherwise a construction must be adopted which will render the contract or ordinance wholly void.

Contemporaneous Construction.

It is claimed by the complainant that the construction placed

upon the ordinance of 1866 at the time of its passage was to the effect that it was to be a grant in perpetuity. The only evidence presented upon this point is the evidence of Mr. Jefferson S. Polk (Record, page 449 et seq.). Mr. Polk's testimony is to the effect that he drew the ordinance in question, that he was one of the incorporators of the company which secured its passage, and was attorney for the company and that he and the company intended that it should be a grant in perpetuity and that it was so considered at that time. Aside from the testimony of Mr. Polk there is nothing to show what was in the minds of the members of the City Council at the time of the passage of this ordinance and it can hardly be claimed that the construction which Mr. Polk, the man who secured the grant, placed upon it is binding upon the City of Des Moines. The general rule is that the meaning of an ordinance must be gathered from the ordinance itself and not from contemporaneous statements of the individuals who made it or who voted for it. *McQuillan Municipal Ordinances,* Page 292.

Statements made by members of the Council, or others, at the time of the passage of an ordinance cannot be resorted to for the purpose of explaining the meaning of the terms used; if they can be resorted to at all, it is only for the purpose of ascertaining the general object of the legislative purpose and the mischief sought to be remedied. *Ah Kow vs. Nunan,* 5 Sawyer, 552-560-561.

In the case of *Blair vs. Chicago,* 201 United States, 400-470 and 471, referred to above, this court was called upon to determine the duration of certain grants made by the Legislature of Illinois for the construction of street railways in the City of Chicago, and it appears that the acts making the grants had been once vetoed by Governor Oglesby the then Governor of Illinois, and that in his message returning the act, he gave to it the construction which was contended for by the railroad company, but this court refused to attach any importance to this contemporaneous construction.

In the case at bar the record shows that the ordinance of 1866 was prepared by the attorney for the party securing the grant and that it was submitted to the Council with a view to obtaining the most liberal grant of privileges they were willing to give. How little

importance then should be attached to the construction placed upon the ordinance by the one who drew it. If the construction placed by Governor Oglesby upon the grants to the Chicago Railway Companies was given no weight in the Blair case, how much less is the opinion of Jefferson S. Polk entitled to consideration in this case. Governor Oglesby was part of the machinery of government in Illinois; it was his duty as Governor to examine every act of the Legislature and to determine its meaning in so far as he could before passing upon it, and in the exercise of that duty he placed a construction upon the grants considered in the Blair case and called the attention of the Legislative branch of the government to that construction. Certainly the record in this case does not present any evidence in the way of contemporaneous construction which is entitled to consideration.

Practical Construction.

It is claimed by the Appellee that there has been placed upon the ordinance of December 10, 1866, a practical construction by the parties thereto to the effect that it is in perpetuity. This practical construction is said to be shown on the part of the City by the passage of certain resolutions and ordinances which are set forth in the record. Substantially exery resolution, ordinance, or other act of the City relating to street railways which has been passed or has taken place during the past twenty years has been offered in evidence, and while in the many resolutions and ordinances passed since the expiration of the thirty year period fixed in the Turner franchise, the Des Moines City Railway Company has been recognized as the owner of the street railways, there is not in any of said acts any mention of the Turner franchise or of the duration of the right had or claimed by the Company under it, and in only three resolutions passed after the consolidation in 1889, and prior to the expiration of the thirty year period, was there any recognition of the Turner franchise. These three resolutions are shown as Exhibit No. 103 (Record, page 218), Exhibit No. 105 (Record, page 219), and Exhibit No. 111 (Record, page 224); the first two of these resolutions were passed in 1890 and the third in 1893; at that time the Turner franchise was in force, and the reference to it as being still in force certainly could not be construed to be a recognition of its existence as a valid contract after the expiration

of the thirty year period in 1898. In 1895 the City of Des Moines did pass an ordinance granting the Des Moines City Railway Company the right to carry United States mail, express and freight, and material for the construction and operation of its road (Exhibit 151, Record page 292), Section Eight of this ordinance (Record, page 294), providing:

"Nothing in this ordinance contained shall be construed as to extend the charter of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charter, and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time."

The grant contained in this freight ordinance was for a period of eight years and the only franchise which by any possible construction could expire within the eight years was the Turner franchise or the franchise of 1866, so that in this ordinance of 1895 the City Council placed a construction upon the Turner franchise to the effect that it might expire within the period fixed in this ordinance, to-wit, in less than eight years from 1895. In other words, the City Council of the City of Des Moines, instead of conceding by its actions that the Turner franchise was perpetual, in 1895 directly indicated that it was of the contrary opinion.

If the Turner or Narrow Guage franchise expired by its terms on January 1, 1898, the exercise of rights under it after this period could not renew or extend the time of the grant, nor could the officers of the City place upon the franchise a construction extending the time which would be binding upon the City. It was held by the Supreme Court of Iowa in *Cedar Rapids Water Company vs. Cedar Rapids*, 118 Iowa, 234-245, citing *Bridge Company vs Prang*, 35th Michigan, 400, and *Inclined R. Company vs. Cincinnati*, 52d Ohio State, 609, that the continued exercise of the right after the expiration of the franchise under which the right was acquired would not operate to renew the franchise or extend the time thereof or estop the public to insist upon the cessation of the use.

The case of the *Cincinnati Inclined Plane Co. vs. Cincinnati*, 52d Ohio State, 609, 44 N. E., 327, is particularly applicable to the case under consideration. In that case the company obtained a franchise for a street railway for a specific term of years. Under the statutes, to renew or extend the term of the franchise required the concurrent action of both the City Council and the Board of Public Works. After the franchise expired the Board of Public Works, acting alone, took certain

action, from which it was claimed there was an implied renewal or extension of the grant or franchise, and thereafter the Company expended a large amount of money in reconstructing and improving its road. It was held that where the concurrent action of both boards was required, there was no renewal or extension by the acts of one without the concurrence of the other and that the continued occupation of the streets and expenditure of money, by the Company in reliance upon the action of the Board of Public Works would not estop the City from proceeding to oust the Company from the streets.

In the case at bar the company uses in operating its road electric power transmitted over electric wires. The statutes of Iowa provide: Code Sec. 775: "Cities and towns shall have the power to authorize and regulate * * * street railway and other electric wires and the poles and other supports thereof." Sec. 776: "No franchise shall be granted, renewed or extended by any city or town for the use of its highways, avenues, alleys or public places for any of the purposes authorized in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election." In Ohio the concurrence of the Council was necessary and the attempted renewal was held to be invalid because the Council did not act; in Iowa the approval of the legal electors is required and there can be no renewal without such approval. In either case no renewal will arise by implication from the acts of one of the bodies which must concur in the grant or renewal or from the continued occupation of the streets or the expenditure of money upon the road.

Under the law laid down in these cases it would be immaterial if the City Council in every resolution and ordinance passed by it since 1898 had expressly recognized and stated that the Turner franchise was a grant in perpetuity for the reason that it had no power to grant a franchise or to renew or extend the term thereof, and if it could not do this directly, it certainly could not do it indirectly. If the City Council had passed an ordinance, the express purpose of which was to recognize the perpetuity of the Turner franchise, it would have been ineffective because it would lack the consent of the electors of the City of Des Moines, and if such an ordinance would be ineffective, of how much less effect for this purpose are the resolutions and or-

dinances and other acts which do not, either in terms or in any other manner, refer to or recognize the existence of the Turner franchise.

Furthermore the Des Moines City Railway Company is the owner of the franchise granted in 1888, known as the Broad Guage Franchise, which franchise, by its terms, expires in 1913. This franchise was broad enough to cover every street in the City if the proper steps were taken by the Company, the authority given being to construct, maintain and operate a system of electric street railways on certain streets named and "such other streets and alleys as the Company may select with the consent and approval of the City."

As will be hereafter pointed out in this argument, the Railway Company can claim no rights under this ordinance at the present time, but why should all of the acts of the City, in relation to street car matters be construed to be a recognition of the Turner Franchise, and not of the Broad Guage Franchise. The resolutions and ordinances refer to no particular franchise, and here is a franchise which has not yet expired by its terms. How much more probable, if the acts of the City are to be construed as a recognition of a right on the part of the railroad company to occupy the streets of the City and to maintain its tracks, that these acts were intended as a recognition of its rights under the Broad Guage Franchise rather than a recognition of rights existing under the Turner Franchise. If this court should hold that the acts of the City do constitute recognition that the Street Railway Company has rights in the City of Des Moines, and there is any ambiguity or doubt as to the purposes and effect of the acts referred to, that is, as to whether they were intended as a recognition of the Turner Franchise as perpetual, or as a recognition of the right to operate the street railway under the unexpired term of the Broad Guage Franchise, the construction should be in favor of the City and against the Company.

The appellant insists that the City of Des Moines and its officers have never in any manner, either directly or indirectly, placed a construction upon the Turner Franchise to the effect that it was in perpetuity. More will be said upon this branch of the case under a division of the argument in reference to the question of whether the City has by its

acts estopped itself from disputing the claims of the appellee as to its rights in the City of Des Moines. This question will be taken up as Division VII of the Argument.

In the argument in the lower court much stress was laid by the complainant upon the fact that the ordinance of 1866 was published in the Revised Ordinances of the City of Des Moines of 1900, this being two years after the expiration of the thirty-year period, and it was claimed that this constituted a recognition of the continued existence of this franchise, after 1898, and was therefore a practical construction given it by the City to the effect that it was in perpetuity. The Revision of 1900 was simply a revision or compilation of all of the ordinances of the City of Des Moines, and was not intended as a re-enactment of any of them. An examination of the report of the compiler, Mr. W. H. Baily, found on page 390 of the record, and of the resolution of the City Council approving the revision as submitted by Mr. Baily, found on page 391 of the record, shows that all that was attempted was to compile the ordinances of the City, so that they might be conveniently referred to. The report of Mr. Baily states that "This revision contains all ordinances now in force, as well as those recently passed and approved by the Mayor, with the following exceptions: * * *" This is not a statement, however, that all of the ordinances contained in the Revision are in force, and since the resolution of the council simply approved the Revision, and did not attempt to re-adopt the ordinances contained in the Revision, the inclusion of this ordinance of 1866 was not an admission by the City of Des Moines that it was still in force. The compiler of the Ordinances of 1900 did not attempt to pass upon the validity of the ordinances which were included in the Revision. That was not his province. All he attempted to do was to collect and arrange in order all of the ordinances of the City of Des Moines of importance, whether in force or not, leaving to others to pass upon the question of their validity and whether still in force.

In this Revision were included many ordinances other than the ordinance of 1866 which were not in force in 1900. For instance, there was included on page 390 an ordinancce of the Town of North Des Moines, granting to the North Des Moines Water Company the right to construct, maintain and operate water works in the Town of North Des Moines. This ordinance was without limit and

expired at the time of the consolidation of the Town of North Des Moines with the City of Des Moines.

Blair vs. Chicago, 201 U. S., 400-448;

This ordinance is not printed in the record. There was also included an ordinance of the City of Des Moines, passed in 1891, granting to the Iowa Telephone Company the right to maintain its poles and wires for a period of five years. This ordinance appears as Section 1202 to 1212, inclusive of the Revision of 1900, but is not printed in the record. This grant expired by its terms in 1896, and by no possible construction could be construed as being in effect after that time. The Revision included the ordinance of North Des Moines, granting to the Des Moines Street Railway Company the right to construct and operate its railroads upon the streets of North Des Moines. (Record, p. 429.) This grant was without limit as to time and expired at the time of the incorporation of the town of North Des Moines into the City of Des Moines in 1890.

Blair vs. Chicago, supra.

The incorporation of this ordinance of 1866 was no more a recognition that it was still in force in 1900 than the incorporation of the grant by the Town of North Des Moines to the Des Moines City Railway Company was a recognition that this grant was still in force; or that the grant to the Iowa Telephone Company was still in force. It had been one of the important ordinances of the City of Des Moines; it had been in effect for thirty years, and was properly included as a part of the history of the relations between the Street Railroad Company and the City of Des Moines at the time of the preparation of the Revision of 1900. No one knew what ordinance or franchise the Des Moines City Railway Company was operating under or what the City Railway was claiming for the various franchises of which it was the owner, and it certainly was not the province of the compiler of the ordinances of the City of Des Moines to pass upon this all-important question.

Even if the City Council of the City of Des Moines did by approving the Revision of 1900 intend to recognize this ordinance as still in force, its act could not have the effect of extending the term of the grant beyond 1898, since it was not within the scope of its authority to grant

or renew or extend franchises without the consent and approval of the electors of the city, as has heretofore been pointed out. It is an absurdity to say that while the City Council of the City of Des Moines could not directly grant a new franchise to the Des Moines City Railway Company, or extend the term of any of the grants which the Railway Company held without the approval of the electors, yet it might, by its acts, place a practical construction upon the franchise which would operate to extend the grant beyond the time fixed in the grant itself. This would be permitting the City Council to do indirectly what the law says it shall not do directly. The Street Railroad was a fact in the City of Des Moines; it occupied the streets with its rails, poles and wires, and was operating its cars. It had been in existence some 32 years and it was a very proper thing for the City of Des Moines, in revising its ordinances, to include therein all ordinances under which it might have or did operate during the whole of the period.

V.

FRANCHISES GRANTED BY THE CITY OF DES MOINES OTHER THAN THE ORDINANCE OF 1866.

In addition to the ordinance of December 10th, 1866, the complainant below claims to be the owner of franchises to operate street railways granted by the City of Des Moines to the Des Moines Broad Guage Street Railway Company. (Exhibit No. 32, record page 106; Exhibit No. 57, record page 138.); to the Des Moines River Line Street Railway Company (Exhibit No. 135, record page 261); to the Des Moines Belt Line Railway Company (Exhibit No. 226, record page 243); to the Des Moines & Sevastopol Railway (Exhibit No. 91, record page 202); to the Des Moines Rapid Transit Company (Exhibit 112, record page 225; Exhibit 114, record page 227).

The decree of the Circuit Court expressly recites that the validity of no other ordinance, had or claimed by the complainant, is passed upon, nor are the rights of the complainant, under any other ordinance, determined or adjudicated, and all questions relative to such other ordinances are not determined: this, notwithstanding the fact that the company was claiming, in its complaint, the benefits of all of

the other ordinances referred to in its bill of complaint, and those offered and introduced in evidence. The respondent submits that the complainant has no right or rights under the ordinance of December 10, 1866, neither does it have any right under any other ordinance granted by the city of Des Moines.

1. Des Moines Broad Guage Street Railway Franchise.—Of the franchises above named the grant to the Des Moines Broad Guage Railroad is the only one which is broad enough in its terms to cover the whole city. The ordinance containing the grant to this road (and we need only consider the second ordinance) is Exhibit No. 57, record page 138. This ordinance was passed in 1887, and the grant therein contained was made for the term of 25 years; it therefore will expire in 1912. The authority conveyed was "to construct, maintain and equip and operate for a term of 25 years, upon the conditions hereinafter stated, with electric or other practical motor power, other than animal or steam power, on any street, single or double, standard or broad guage street railway tracks four feet eight and a half inches wide, along and through the streets, alleys, viaducts and bridges of and within the city of Des Moines hereinafter designated; and such other streets and alleys as such company may hereafter select with the consent and approval of said city." (Sec. 1, Ex. No. 57, record page 138.)

Under this grant of authority the Des Moines City Railway Company, the assignee of the Des Moines Broad Guage Street Railway Company might operate on any street in the city of Des Moines, having first obtained the consent of the city council to enter upon the said street. The Des Moines City Railway Company, however, has never operated its road under the terms of this franchise, and by its acts has clearly shown that it had abandoned its right to operate thereunder.

By Sec. 21 of this ordinance (Record, page 144) the Company is required to pay into the city treasury five per cent of its net earnings annually, after the expiration of ten years from the passage of the ordinance. This would require the company to make payments commencing with the year 1898. These payments have never been made. (Testimony of G. B. Hippee, record, page 615.) By Sec-

tions 1 and 3 of this ordinance (Record, pages 139, 140), the Railway Company is required to obtain permission of the city council before laying tracks on streets other than those mentioned in this ordinance. This provision of the franchise has not been complied with. (Testimony of G. B. Hippee, Record, page 615.) A failure to comply with the terms and conditions of a franchise will constitute an abandonment thereof.

Since the consolidation of the street railways of the city of Des Moines in 1889 (Record, page 197), if the Street Railway Company was operating under the terms of the Des Moines Broad Guage franchise, it became necessary for it, before entering upon any streets other than those named in the ordinance itself, to secure permission from the city council, either in the form of a resolution or an ordinance, while if it was operating under the ordinance of 1866 it had the right to enter upon any street without first obtaining such permission, unless such street was within one block of a street already occupied. The record discloses (Testimony of G. B. Hippee, Record, page 615-616), that it has never obtained permission before entering upon any street which it desired to occupy with its tracks. Furthermore, if it was operating under the Broad Guage franchise, it should have been paying into the treasury of the City of Des Moines five per cent of its net earnings each year, commencing with the year 1898, while if it operated under the ordinance of 1866 such payment was not necessary. That there have been net earnings in that period of time is shown by the testimony of G. B. Hippee, (Record page 617) although no payments have been made to the city. (Testimony of G. B. Hippee, record page 615.) The intention of the Des Moines City Railway Company must, of course, be determined from its acts and the fact that it has wholly failed to comply with two very important requirements of the Broad Guage franchise indicates very clearly an intention not to operate thereunder. The fact that it has failed for so long a time to comply with the conditions of the Broad Guage franchise, while not controlling, is at least a strong indication of an intention to abandon. The intention to abandon, coupled with non-user is sufficient to constitute an entire abandonment of all the rights under this franchise. In the case of *Welsh vs. Taylor*, 31 N. E., 896, on page 898, it was said:

"There must be found in the facts and circumstances connected with the non-user an intention on the part of the owner of the easement to give it up, but the intention existing coupled with the non-user will uphold a finding of abandonment."

And in *Harkrader vs. Carroll*, 76 Fed., 474, the court said:

"Abandonment is a matter of intention, and whenever the intention and an actual surrender of the claim are united the abandonment is complete and operates instanter to restore the title to the United States. * * * While lapse of time is not an essential element of abandonment it may be a strong circumstance in connection with others to prove the intention to abandon."

That at the time of the consolidation in 1889 it was the intention of the Des Moines Street Railway Company to operate under the Turner franchise is clearly shown by the fact that in the consolidation resolutions (Exhibit No. 85, page 195; Exhibit No. 86, page 196; Exhibit No. 87, page 197), provision was made for modifications in the existing franchises; the modifications to be of such a nature as would require the Company to so adjust its system of tracks that parallel streets should "not be occupied nearer than two blocks apart," and permitting the company to operate by electricity or other practical motive power. The Des Moines Broad Guage franchise covered both of these propositions; in section one thereof (Record, page 138), it was provided that the company should only occupy such streets other than those named in the ordinance as the city might permit it to occupy, and in section two (Record, page 139), authority was given to use electric or other motive power. If the Company intended to use the Broad Guage franchise, there was no necessity for any changes.

That this intention was carried out was shown by the fact that after the consolidation the only franchise which was modified was the ordinance of 1866. On the 8th day of March, 1890, the City Council of the city of Des Moines enacted Ordinance No. 492, being "An Ordinance amending Ordinance No. 63, entitled, An ordinance authorizing the construction and operation of certain street railroads in and along the streets of the City of Des Moines, passed December 10th, 1866." (Exhibits No. 101 and 102, Record, page 216.) (The record reads Ordinance No. 53, passed December 10th, 1886; this is evidently a typographical error.) This ordinance amended Section

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two of the ordinance of December 10th, 1866, among others, and provides that section two shall read: "The cars to be used upon the railway tracks constructed under and in pursuance of this ordinance, or acquired by said Company or its assigns, or that hereafter may be constructed or acquired, shall be operated by animal power or by electricity, or other practical motor power." And further along it also provides for reconstructing and laying of tracks on parallel streets, so that they shall not be laid nearer together than two blocks without the consent of the council, expressed in a resolution or ordinance.

No other franchise was changed. The consolidation resolutions therefore, show that it was the intention of the Railway Company and the expectation of the city that the street railway company would not operate under the Broad Guage franchise, and that this intention was carried out is shown by the fact that the franchise of December 10th, 1866, was amended to conform to the provisions of the consolidation resolutions.

The intention to abandon is shown by the acts of the Company and the City at the time of the consolidation. The failure of the Company, thereafter, to comply with the terms of the Broad Guage franchise, and this coupled with the non-user for a period of 16 years at the commencement of this action, 19 years at the present time, is certainly sufficient to constitute a total abandonment and relinquishment of all rights under this ordinance.

Furthermore, a reading of the bill of complaint shows that the complainant below claims to have been operating at least since 1898 under the franchise of 1866, as is shown by the following quotations therefrom: The 4th sub-division of paragraph 32, (record page 14): "Your orator further alleges that it now has, and that its grantors always claimed the right to build, extend and operate its street railways upon such streets in the City of Des Moines as are necessary for the extension and development of its system of street railways. * * *" And in the 7th sub-division of the same paragraph: "That your orator is about to enter upon certain streets within said city for the purpose of laying its tracks thereon in accordance with the terms and provisions hereinbefore set out. * * *" In other words the complainant below claimed the right to enter upon such streets as it saw fit

to use, regardless of whether or not it had the consent of the city council, and the only ordinance which granted such a right is the ordinance of 1866. In paragraph 31 of the Bill of Complaint (Record, page 13), the complainant below says: "That the said City of Des Moines has, by a long series of acts and enactments, during a long series of years, uniformly treated the said ordinance as a contract, as above set out, and has, by the enactment of many ordinances and resolutions since the year 1890 uniformly recognized the said ordinance of December 10th, 1866, as a contract and interpreted it as hereinbefore set out." In other words, the complainant below insists that all of the resolutions and ordinances which have been passed and enacted by the City Council of the City of Des Moines in reference to street railway matters since the consolidation, have been passed and enacted with reference to the ordinance of 1866, and that all of these enactments, including those passed since 1898, recognize the ordinance of 1866 as a contract. If they did, it must be because the railway company was operating thereunder, since, in not a single ordinance or resolution passed or enacted since the enactment of the amendment to the ordinance of 1866, above referred to, and which was passed on the 9th day of March, 1890, is there any reference in terms to the ordinance of 1866. Since the complainant below claims that all of these enactments recognize the ordinance of 1866 as a valid and existing franchise, it must be that it claimed to be and was operating thereunder, and it must, therefore, have abandoned the Broad Guage franchises and all other franchises. No other theory is consistent with the contention of the complainant below. The claim that the resolutions and ordinances of the council recognize the ordinance of 1866 as a contract, without any direct reference in such resolutions and ordinances thereto, can only be made upon the ground that the Des Moines City Railway Company was claiming the right to operate thereunder. The Railway Company, by its own declaration, shows that it had abandoned the Des Moines Broad Guage franchise, and it can, therefore, claim no rights thereunder.

2. The Des Moines River Line Street Railway Franchise. (Exhibit 135, Record, page 261.) The ordinance granting to the Des Moines River Line Street Railway Company the right to construct its railway, was passed Sept. 20th, 1888, and seems to be without

term. Because of the fact that it is without term, and the city had no authority to grant a franchise in perpetuity, as we have shown in Division Three of this Argument, this grant was absolutely void. Moreover, it only grants the right to construct upon three streets, and for an extremely short distance upon each of these streets, the total length of road authorized being five blocks. This franchise only authorizes the grantee to propel its cars by steam, applied by what is known as a cable system, or what is known as a noiseless steam motor. (Sec. 2, Exhibit 135, Record page 261.) The Des Moines City Railway propels its cars by electricity supplied from an overhead wire. (Testimony of G. B. Hippee, Record, page 541), and it follows therefore, that it has never made use of this franchise, and never will.

Furthermore, in Section 21 of the ordinance (Record, page 266), there is a requirement that after ten years from the date of the passage of the ordinance, which was passed September 20, 1888, the grantee was to pay to the city five per cent of its net earnings. This payment has never been made. (Testimony of G. B. Hippee, Record, page 615.) This franchise has, therefore, been abandoned and the appellee can claim no right thereunder.

In Sec. 12 of this grant (Record, page 264), there is a provision for a forfeiture if the company shall fail to use any of the track or tracks constructed thereunder and run cars thereon for a period of thirty days, and authorizing the City Council by resolution to declare the streets or parts of streets not used abandoned, and requiring the company to remove their tracks. The resolution of the council of November 21, 1905, so far as this franchise is concerned, should be treated as a declaration of such abandonment, since the Company has failed to operate under the provisions of the ordinance.

3. Des Moines Belt Line Railway Company Franchise. (Exhibit No. 126, Record, page 243; Exhibit 130, Record, page 247). This franchise was granted on the 16th day of May, 1888, and seems to be without term. Since the grant is without term and the City of Des Moines had no power to grant a perpetual franchise, as has been shown in Division Three of this Argument, this franchise is absolutely void. It covers but a few blocks in the City of Des Moines and is of

no practical value to the appellee. Moreover, it authorizes the company to use as a motive power only steam or electric motor. (Sec. 5, Exhibit No. 126, Record, page 244.) The Des Moines City Railway Company does not use either steam or electric motor as a motive power, and never has, and never will, and therefore has abandoned this franchise and can claim no rights thereunder.

4. The Des Moines & Sevastopol Railway Franchise. (Exhibit 91, Record page 202.) This franchise was granted on the 10th day of November, 1883, and was for a term of thirty years; it therefore expires in 1913. It covers the streets in but a small portion of the City of Des Moines. (Sec. 1, Exhibit No. 91, Record, page 202.) Moreover, that ordinance authorizes the company to propel its cars by animal power only. The appellee has not used animal power for propelling its cars, and has abandoned this franchise by a failure to comply with its terms.

5. The Des Moines Rapid Transit Company Franchises. (Exhibits 112, 114, Record, page 225, 227 and 231.) The grants to the Des Moines Rapid Transit Company were made on May 14, 1888, and August 21, 1888, and no term was named. The franchise being without term, and the City of Des Moines having no power to grant a perpetual franchise, as has been shown in Division Three of this Argument, these ordinances are void. The ordinances cover but two streets in the city, these being Grand Avenue from Fifth Street west to a point between 17th and 19th Streets, and Ingersoll Avenue from 19th Street west to the old city limits.

The grant in both ordinances is to the Des Moines Rapid Transit Company, without words of succession or assignment. (Sec. 1, Exhibit 113, Record, page 225; Sec. 1., Ex. 114, Record, page 227.) Since a franchise which contains no words of succession or assignment cannot be sold or transferred, the appellee can claim no rights under these ordinances.

In *Thomas vs. Railway Company*, 101 U. S., 71, in which was involved the question of the right of the grantees of a railroad franchise to release and surrender control over its franchise to an assignee, so that it was left in the hands of the assignee to carry out and

perform the public function required in the franchise, the court held the assignment void, and said on page 83:

"The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions and which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

And on page 84, the Court quotes with approval from the case of *Black vs. Canal Company*, 7 C. E. Green, 130, 22 N. J. Equity, 130, the following language:

"It may be considered as settled that a corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the state without legislative authority."

In the case of *Penn Ry. Co. vs. St. Louis Ry. Co.*, 118 U. S., 290, the court, after a review of the cases, says, on page 309:

"We think it may be stated as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers. * * *"

In the case of the *Oregon Railway & Navigation Company vs. Oregon Ry. Co.*, 130 U. S., page 1, the same doctrine is announced.

It follows, therefore, from the principle laid down in these cases, that the Des Moines Rapid Transit Company had no power to transfer the franchises granted to it by the City of Des Moines, for these franchises contained no words authorizing the sale or transfer, and the rights granted must, therefore, be considered as granted to the Des Moines Rapid Transit Company only, and in the expectation and with the intention that they should be exercised only by this company. The Des Moines City Railway Company can, therefore, claim no rights under the franchises granted to the Des Moines Rapid Transit Company.

VI.

THE COMPLAINANT HAS NO RIGHT OR RIGHTS UNDER THE ORDINANCES ENACTED BY THE SUBURBAN TOWNS WHICH WERE ANNEXED TO DES MOINES IN 1890.

In 1890 there were annexed to the City of Des Moines, and included and incorporated therein, a number of independent municipalities lying contiguous to the City of Des Moines. Prior to this annexation some of these municipalities had granted franchises to various street railway companies, each and all of which franchises the appellee claims now to own, and is asserting some rights thereunder. The franchises which were granted by these various municipalities were as follows:

Town of North Des Moines to the Des Moines Street Railway Company, granted May 9, 1885. (Exhibit 19, Record, page 87.)

Town of North Des Moines to the Des Moines Broad Guage Street Railway Company, granted July 6th, 1886. (Exhibit 32, Record, page 106.)

Town of North Des Moines to the Des Moines Electric Railway Company, successor to Des Moines Broad Guage Railway Company, granted August 8th, 1888 (Exhibit 69, Record, page 181.)

Town of North Des Moines to the Des Moines Electric Railway Company, granted February 28, 1889. (Exhibit 77, Record, page 189.)

Town of North Des Moines to the Des Moines Electric Railway Company, granted April 4, 1889. (Exhibit 79, Record, page 190.)

Town of North Des Moines to the Des Moines Belt Line Railway Company, granted February 28, 1889. (Exhibit 132, Record, page 250.)

Town of North Des Moines to the Des Moines Belt Line Railway Company, granted February 7, 1890. (Exhibit 133, Record, page 252.)

Town of North Des Moines to the Des Moines Street Railroad Company, granted November 13, 1888. (Exhibit 75, Record, page 188.)

Town of Capital Park to the Des Moines Street Railroad Company, granted June 1st, 1887. (Exhibit 146, Record, page 282.)

Town of Capital Park to the Des Moines Broad Guage Street Railway Company, granted April 19, 1887. (Exhibit 145, Record, page 278.)

Town of University Place to the Des Moines Electric Railway Company, granted April 1, 1889. (Exhibit 148, Record, page 288.)

Town of Sevastopol to the Des Moines & Sevastopol Railway Company, granted August 10th, 1885. (Exhibit 93, Record, page 205.)

Town of Grant Park to B. F. Elbert et al., granted October 12, 1888. (Exhibit 143, Record, page 275.)

Town of Greenwood Park to the Des Moines Rapid Transit Company, granted September 28, 1888. Exhibit 115, Record, page 231.)

Of these franchises some were without term, some contained no words of assignability or succession; others provided for motive power other than electricity supplied from an overhead wire; some were applicable to particular streets which have never been occupied, and others contained conditions which have never been complied with; and therefore, the appellee can claim no rights under any of them.

1. Franchises Without Term.—Of the franchises granted by the municipalities which were incorporated into the City of Des Moines in 1890, enumerated above, the following had no term fixed therein for the duration of the grant:

Town of North Des Moines to the Des Moines Street Railway Company, (Exhibit 19, Record, page 87);

Town of North Des Moines to Des Moines Street Railroad Company, (Exhibit 75, Record, page 188);

Town of North Des Moines to the Des Moines Electric Railway Company, granted February 18, 1889, (Exhibit 77, Record, page 189);

Town of Grant Park to B. F. Elbert et al., (Exhibit 143, Record, page 275);

Town of Greenwood Park to Des Moines Rapid Transit Company, (Exhibit 115, Record, page 231).

As has been shown in Division Three of this Argument these municipalities had no power to grant franchises in perpetuity; it follows,

therefore, that these five grants were void for want of authority in the municipality.

But if this were not true, yet, by the incorporation of these smaller municipalities into the City of Des Moines, these grants were terminated.

In the case of the *People vs. Chicago Telephone Co.*, 77 N. E., 245, there was involved the right of the Telephone Company to continue to operate under franchises granted by incorporated towns immediately adjacent to the city after these towns had been incorporated into the City of Chicago. The franchises granted by the towns did not fix the rates to be charged for the service, while the ordinances of the City of Chicago fixed the maximum rate to be charged. The Telephone Company claimed the right to charge in the territory covered by the ordinances of the towns such amount as they deemed best, while the City of Chicago claimed that it could only charge the rate fixed in the Chicago ordinances, and upon this question the court said:

"The ground of defendant's claim that the ordinance does not limit its charges in the annexed territory, is that before the annexation the minor municipalities had granted to it the right to occupy the streets therein for its business without any limit as to the time. If the grants had been for terms of years under legislative authority authorizing them, and the terms had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the city because they had become binding contracts under which the defendant had vested contract rights for such term. But they were of no definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service, to the town or village hall, or the village authorities free, or for some reduced rate. Such grants cannot be construed to be perpetual, and at most cannot extend beyond the lives of the corporations granting them. Upon the annexation there ceased to be any town or village authorities."

In the case of *Blair vs. Chicago*, 201 U. S., 400, 488, 50 L. Ed., 801, this court had occasion to pass upon the validity of a franchise granted to a street railway company by the town of Lake View, the territory therein having been annexed to the City of Chicago in 1889. The grant was without limit as to time, and upon this question this court said, on page 488 of the opinion:

"We think in such case that the terms granted would not extend

beyond the life of the corporation conferring them, where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity."

This court then quoted with approval the language above quoted from the case of *People vs. Chicago Telephone Co.*, 77 N. E., 245, and in reference thereto says:

"This seems to us a reasonable view, and being the construction of the highest court of the state of Illinois we are willing to accept it."

Under the rule laid down in these cases, whatever may be said with reference to the franchises granted by the suburban towns around the City of Des Moines, which were for a fixed and definite term, all rights under the five franchises above listed terminated at the time of the annexation.

2. Franchises Containing No Words of Assignability or Succession.—Four of the franchises granted by the suburban towns, which were afterward incorporated into the City of Des Moines, contained no words of succession or assignability. These are the franchises granted by the town of North Des Moines to the Des Moines Street Railroad Company (Exhibit 75, Record 188); Town of North Des Moines to Des Moines Belt Line Railway Company (Exhibit 133, Record, page 252); Town of Greenwood Park to Des Moines Rapid Transit Company (Exhibit 115, Record, page 231); Town of Grant Park to B. F. Elbert et al., (Exhibit 143, Record, page 275). These franchises could not be sold, assigned or transferred to any other company, as has been shown in a previous division of this argument, and therefore, the Des Moines City Railway Company can claim no rights thereunder.

3. The franchise granted by the Town of North Des Moines to the Des Moines Broad Guage Street Railway Company, under date of July 6, 1886 (Exhibit 32, Record, page 106), which was amended by the ordinance of August 8, 1888, (shown as Exhibit No. 69, Record, page 181), was for twenty-five years, and expires July 6, 1911. This franchise has been abandoned by the Street Railway Company as is shown by the fact that the ordinance requires that except upon those streets which are named in the ordinance the Railway Company shall obtain the permission of the Council before laying its tracks

thereon. This permission has never been obtained (testimony of G. B. Hippee, Record, page 616).

4. The franchise granted by the Town of North Des Moines to the Des Moines Electric Railway Company, successor to the Des Moines Broad Guage Street Railway Company, April 4, 1889, (shown as Exhibit 78, Record, page 190), grants to this company the right to construct a railway on North Street, now University Avenue, from Seventeenth Street to the west corporate limits of the town. This piece of track was never constructed during the existence of the Town of North Des Moines, and, in fact, was not constructed until 1903. (Testimony of G. B. Hippee, Record, page 16). At the time of its construction, it could not have been constructed under either of these ordinances, because the Town of North Des Moines had ceased to exist, and the company having acquired no rights thereunder prior to the time the corporation making the grant had gone out of existence was hardly in a position to claim rights thereunder fourteen years after the grant. At any rate, this franchise covers but a few blocks on one street, and is of no practical value.

5. The franchise granted by the Town of North Des Moines to the Des Moines Belt Line Railway Company under date of February 28, 1889, (Exhibit 132, Record, page 250), grants the right to construct on State Street from Main Street west to the corporate limits. This track has not been constructed to this day, (See Map Exhibit "F," Record, 678), and this franchise must be considered as abandoned, since in Section 3 of the ordinance (Record, page 251), there is a requirement that the track be constructed within six months on a portion of the line, and within eighteen months on the balance, and a further provision for a forfeiture if these conditions are not complied with. The resolution of the City Council of the City of Des Moines, November 21, 1905, forfeited this right if it had not been lost sooner. A failure to occupy a street for a period of nineteen years from the time the authority to occupy it is granted by the franchise certainly indicates an intention to abandon and an actual abandonment of all rights under the franchise.

6. The franchise granted by the Town of Capital Park, under date of April 19, 1887, (Exhibit 145, Record, page 278), was for a

term of twenty-five years, and expires in 1912. This franchise covers specific streets, and, as is shown by the plat, Exhibit B, attached to the Record, none of the streets included in the ordinance were ever occupied, except Ninth Street, from the corporation line north to Washington Avenue. The failure of the Company to construct upon the balance of the streets, even to this day, as shown by Plat Exhibit F attached to the record, certainly indicates an abandonment of this franchise, as least as to all streets except Ninth Street. In section 10 of the ordinance there is a provision for a forfeiture, and the resolution of the City Council of the City of Des Moines of November 21, 1905, is a declaration of such forfeiture, if the right to occupy such streets had not been abandoned long before that.

7. The franchise granted by the town of Capital Park to the Des Moines Broad Guage Street Railway, under date of April 19, 1887, was for a period of twenty-five years, and expires in 1912. (Exhibit 145, Record, page 278). This franchise covers specific streets in the Town of Capital Park, none of which have ever been occupied to this day, as is shown by the maps, Exhibits A, B, C, D, E and F attached to the record. Certainly a failure to construct for a period of twenty-one years after the date of the grant is an abandonment of all rights under the grant.

8. The franchise granted by the Town of University Place to the Des Moines Electric Railway Company, under date of April 1, 1889, (Exhibit 148, Record, page 288), was for a period of twenty-five years and expires in 1914. This franchise covers but nine blocks and is of no practical value to the Des Moines City Railway Company. It has never operated thereunder, but has used the tracks on these streets in connection with its tracks on other streets which were operated under the ordinance of 1886.

9. The franchise granted by the Town of Sevastopol to the Des Moines & Sevastopol Railway, under date of August 10, 1885, (Exhibit 9, Record, page 205), was for a period of thirty-five years and expires in 1920. This franchise authorizes the use of animal power only (Sec 2, Exhibit 93, Record, page 206). The Des Moines City Railway Company is not operating by animal power but is using electricity supplied from an overhead wire in the operation of its cars. It

is not, therefore, operating under this franchise and has not been for a period of at least seventeen years, which certainly constitutes an abandonment of the grant.

10. We see no good reason why the rule laid down in the case of *Blair vs. City of Chicago*, 201, U. S. 400-467, that a franchise to a street railway company which is without term expires with the life of the corporation making the grant should not apply to these franchises which have a fixed and definite term. The same reasoning will apply in both cases. Under the grants for a fixed term, the public service corporation assumed certain duties to the public of the town making the grant, and with the expiration of the life of the corporation making the grant there was no one left for whose benefit these duties could be performed. A public service corporation accepting a grant takes it knowing that the life of the municipality may be ended at any time and therefore assumes this risk when it accepts the grant. The rule laid down in the case of *Blair vs. City of Chicago* and in the case of *People vs. Chicago Telephone Company*, should be extended to include those franchises which are granted for a fixed term.

VII.

The Appellant is not Estopped from Questioning the Right of the Appellee to Occupy its Streets.

The complainant below, in its bill, while not specifically claiming an estoppel, yet inferentially seems to rely upon one, claiming that the city having permitted it to make expenditures and extend its tracks since 1898, and having recognized its existence by resolutions and ordinances passed by the City Council, is now estopped from claiming that it has no rights in the streets.

To be available, matters in estoppel must be especially pleaded. As was said in *Golden vs. Hardesty*, 93 Iowa, 622-627:

"It is a well settled rule in this state that matters in estoppel to be available as such must be especially pleaded."

In support of this doctrine many Iowa cases are cited. This rule is so universal that it seems to be unnecessary to quote further from the authorities, and we submit that the appellee, the complainant in

this case, does not plead specifically an estoppel, and that therefore the appellee is not in a position to rely thereon.

But however that may be, a street railway, which is in possession of a street after the expiration of its franchise is a mere trespasser, and the fact that it has made expenditures since the expiration of its franchise and that the value of its property will be affected by a forfeiture of its rights can not estop the municipality from questioning its rights in the streets.

Neither can expenditures in improvements after the expiration of the franchise operate as a renewal thereof. In the case of *Cedar Rapids Water Company vs. Cedar Rapids*, 118 Iowa, 234, in which was involved the rights of the water company in the streets of Cedar Rapids after the expiration of its franchise, it was said, on page 254:

"The claim of actual possession and use of the franchise by the plaintiff does not, as we view it, add to the strength of its position. * * It is true that at the time this action was begun the plaintiff had been furnishing the City of Cedar Rapids and its people with water for twenty-five years, but such service had been rendered under a contract which, as we have held, was limited to that period, and the money and labor expended in constructing, maintaining and operating the works must be held to have been expended with reference to the term for which it held a valid grant. Neither can there be any such acquiescence or waiver by the City as will prevent or estop it from denying the validity of an act beyond the scope of its municipal powers. * * * Nor do we see how the failure of the state to institute *quo warranto* proceedings affects the rights of the parties under the circumstances. To apply the language above quoted from Judge Cooley, 'a waiver by the state cannot have the effect to revive an estate which has expired by limitation,' and especially a limitation which inheres in the grant by virtue of the statute, from which alone the power to make the grant is derived. * * * It is said that to hold the franchise to have expired and put it in the power of the city to terminate the privilege enjoyed by the plaintiff is to destroy the value of plaintiff's property and thus perpetrate upon it a great injury. * * * But assuming that it does result in a loss, such is the frequent event attending business enterprises. Plaintiff entered into a contract having a definite limit and with knowledge of the city's lawful right to insist that the limit be observed, and if by any mistake of judgment on its own part, or by the exercise of any lawful power on the part of the city the enterprise has proved unprofitable, it is not a ground for relief at the hands of the court. The fact that the exercise of a lawful power may affect the value of plaintiff's property is also in itself immaterial."

In the case of *Grand Rapids Bridge Company vs. Prang*, 35 Mich., 400, the plaintiff had been granted a right to locate a bridge and take tolls for a period of twenty years. The term expired and the plaintiff having continued to take tolls without objection from the state, from which it derived its corporate existence, or the Board of Supervisors from which it received the franchise to take tolls, claimed the right to take tolls for the balance of its corporate life. The right was denied, the court saying, on page 405:

"In this case there is no question of forfeiture, but there is a question of the continued existence of the franchise to take tolls. The estate in it was expressly limited to twenty years and when that period came to an end the estate ceased also. There was no longer color of law for taking tolls, and the failure of the state to institute proceedings could no more continue the franchise or restore it to life than the like failure in the case of one who should erect a gate across a common highway and levy tolls. When the twenty years expired, the defendant had a right to refuse to pay any longer, and every person had the like right. If all others acquiesced their action could not bind the one who refused."

The case of the *Cincinnati Inclined Plane Co. vs. The City of Cincinnati*, 44 N. E., 327, is very much like the case at bar. The City of Cincinnati had granted to the Cincinnati Inclined Plane Company the right to operate their line of railway upon certain streets. The grants, by their terms expiring in 1884 and in 1885, the Railway Company was given permission by the Board of Public Works, as required by the Ohio statutes, to use other motive power than animal. The statutes also provide that renewals of grants in streets may be made by the action of the Board of Public Works and the City Council. The Railway Company continued to operate, and expenditures were made in improvements and extensions. It was contended by the Railway Company that such acquiescence and the action of the Board of Public Works in allowing the change of motive power amounted to an implied renewal of the grants to use the streets, and the city ought to be estopped to deny it. Upon this question the court said, on page 249:

"But it may be said that the expenditures which the defendant incurred in substituting electricity as a motive power estops the city from claiming there was not a renewal, and therefore there is a renewal by estoppel. It is a sufficient answer to this claim to say that these expenditures were not authorized by both boards in whom was vested jurisdiction to make renewals. But if they had been so authorized,

what amount of expenditure should a court hold was necessary to constitute a renewal and how are we to determine from the amount of expenditures the time for which such renewal was made, for one year or for twenty-five years? And suppose a street railway had no grant in the beginning, what amount of expenditure would be sufficient to give them an implied grant?"

The court held that the city was not estopped, and held that the grants expired in 1884, and that thereafter the plaintiff was a mere trespasser upon the streets of the city.

Since the enactment of the Code of 1897, to extend or renew the franchise of a street railway company operating by means of electricity supplied by means of an overhead wire in any municipality in Iowa requires the concurrent action of the city council and the electors of such city.

Section 775 of the Code of 1897 of Iowa, provides that "cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof * * *" and Section 776 provides that "No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places for any of the purposes named in the preceding section unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election." The Des Moines City Railway Company operates its cars by means of electricity supplied from an overhead wire, and no act of the city council could renew or extend the franchise of such railway company without the consent of the electors. No such consent has been granted or given.

When the concurrent action of two bodies is required in granting a franchise, the grant of the one without the concurrence of the other, even though expenditures are made in reliance thereon, is ineffective. As was said in the case of the *Cincinnati Inclined Plane Company vs. City of Cincinnati*, supra, on page 333:

"Did these resolutions of the board of public works and board of public affairs, and the expenditures made by the defendant company by virtue of them, impliedly renew this grant as of route No. 8, or give vitality to the void grants of 1871 and 1875? Our statutes in force in 1885 and 1888 provided for the renewal of grants for street railroads and defined the limits of time of such renewals. They also

provided that no renewal should be made except by the concurrent action of the board of public works and the city council. Now, whether in view of these express statutory provisions it is possible under the laws of Ohio to have an implied renewal of the street railroad grant without some express action of these boards it is not necessary for us to determine at this time. *Booth St. Ry. Law*, Sec. 43. But conceding that there may be such an implied renewal, it can only arise from the acts of those officials who have the power to make the renewal: and where, as in this case, only one of the boards authorized to make the renewal acted in the matter, it necessarily follows that there can be no renewal of such grant."

It is elemental that to constitute an estoppel or waiver on the part of a municipal corporation, the acts relied upon as constituting such estoppel or waiver must be the acts of officers acting within the scope of their authority and power.

In the case of *Seager vs. Mueller* (Ill.) 24 N. E., 513, it is said on page 514:

"No estoppel can ordinarily arise from the act of a corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore, cannot be deemed to have been deceived or misled by acts done without legal authority."

The case of *Driscoll vs. New Haven* (Conn.), 52 At., 618, 19-20, was a case in which the common council of New Haven had entered into a contract with plaintiff in regard to the sale of land, which the court found was not within the powers of the council to make. It was contended that the city council had received consideration for the contract and were equitably bound to perform their part. Upon this the court said:

"The court of common council of the defendant city has never voted to sell or convey or authorized the sale or conveyance of the land in question. No other officer or board has the power to do so. The contention of these moving defendants against the city must, therefore, arise upon equitable consideration alone. There must appear to have been some agrement, inducement or conduct on the city's part which has reasonably influenced its said co-defendants to action which would work to their injury if the city is not now compelled to do what it had thus allowed them to believe it would do. This agreement, inducement or conduct must have been that of representatives of the city authorized to bind it in the matter in question, or an agreement, inducement or conduct by others so confirmed or ratified by these proper representatives as to have become binding upon the city as

the act of these representatives. Unauthorized agents or representatives can of themselves alone no more bind equitably than they can legally. * * * The defendant Beechan, when he negotiated with the board or its president, was bound to know the limitations upon their powers. He was bound to know that the court of common council of the city could make a binding agreement with him of the character of that alleged to have been made; he had no right to rely upon any agreement made by other city officers, and can therefore base no equity, enforcable in the courts, upon such an agreement."

In the case of *State vs. Minnesota Transfer Railway Company*, 83 N. W., 32, on the question of estoppel, the court said, on page 35:

"And of course it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril inquire into the power of the corporation and its officers to make the contract. * * * Estoppel in this case or in any other where a plain duty rests upon the party cannot be predicated upon the compromise of some difference of opinion as to exactly what the performance of that duty requires."

In the case of *Wormstead vs. Lynn* (Mass.) 68 N. E., 841-42-43, referring to a plea of estoppel, the court said:

"For the decisive answer to the whole contention is that the doctrine relied on by him has no application where a person enters into a contract with a public officer who undertakes to act for and to bind a municipal corporation or other body politic. Such a person is bound, at his peril, to ascertain the extent of the authority of the public officer with whom he is dealing. In such a case the money pledged for the payment of the contractor is the money of the public, or of an ascertained portion of the public, and the public is not estopped by violation of duty on the part of public officials, no matter how many officials may have been concerned in it, and no matter how long it may have continued."

In the case of *Marsh vs. Fulton County*, 10 Wall., 676, bonds had been issued by the defendant county in payment of a subscription to a railroad company, without the proposition having first been submitted to the legal voters of the county, as required by the statute of Illinois. On one occasion interest had been paid by the county on these bonds, two of the bonds had been paid, and in numerous ways, as the plaintiff claimed, the liability of the county had been recognized. These facts together with the fact that the bonds were in the hands of innocent holders were contended by the plaintiff to constitute an estoppel against the county to plead the illegality of the original issue. The court

held, however, that the county could not be thus estopped, and on page 684 said:

"A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that the ratification can only be made when the party ratifying possesses the power to perform the act ratified. * * * It would be absurd to say that they could, without such vote, by simple expression of approval, or in some other indirect way, give validity to the acts, when they were directly in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."

And again, the court says:

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains money or property of others without authority, the law, independently of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way when the statute declares that it shall only be created in another and different way."

In the case of *Lancaster vs. Miller*, (Ohio) 51 N. E., 54 referring to a plea of estoppel based upon the acts of certain public officers, the court says:

"Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which statutes impose. A corporation should not be estopped by the acts of its officers to set up these statutes in defense of contract made in disregard of them. It would be idle to enact these statutes and afterwards permit their practical abrogation by neglect or misconduct of the officers of the municipality."

The legislature of Iowa, when it enacted Section 775 and 776 of the Code of 1897, limited the power of city councils in reference to the granting, renewing and extending of franchises of the kind in question in this suit. It therein prescribed the steps which must be taken to secure or to renew or extend such a franchise, and to hold that the acts of the city council or other officers of the City of Des Moines since the expiration of the franchise of 1866, could operate as a renewal of such franchise or as an extension thereof, would be to abrogate the provisions of these two sections. A franchise to construct a street railway operated by electricity supplied from an overhead wire on the streets

of any municipality in Iowa, or the renewal or extension of such a franchise, can be obtained only with the approval of the electors of such municipality.

What has been said with reference to estoppel and waiver, is applicable to the claim that the city, by its acts, has placed an interpretation upon the ordinance of 1866 to the effect that it is perpetual. If it is beyond the power of the city council or the city officers to renew or extend this franchise, without a vote of the people, it certainly is beyond their power to place an interpretation upon a contract which will be binding upon the city. It is a peculiar condition that the Street Railway Company should claim that everything which the city has done in reference to street railway matters has been a recognition of the perpetuity of the grant of 1866, while at the same time they are claiming that they have other franchises under which they are entitled to operate. Why is it that none of the acts of the city and its officers bear no relation to the other franchises and have not been in recognition of them?

The acts which the appellee is relying upon as constituting the recognition of the existence as a valid contract of the ordinance of 1866, and as estopping the city from questioning its rights in the streets, and as having placed an interpretation upon the contract to the effect that it is perpetual, consist of various resolutions and ordinances passed by the city council of the city of Des Moines, the requirement that it pay its part of the cost of paving the streets upon which its tracks are constructed, and the requirement that it pay to the owners of abutting property a portion of the value of paving on streets already paved, upon which it desired to lay its tracks. The resolutions referred to nearly all relate to paving matters, as will be seen from an inspection of the record. None of them, in terms, refer to any franchise or ordinance in particular. The ordinances referred to are in general regulating ordinances, applicable to all street railways, with the exception of one or two, which grant rights to the Des Moines City Railway Company, with reference to the carrying of freight or mail. None of these ordinances refer to any franchise in particular, unless it may be the ordinance passed on the 4th day of February, 1895, which was an ordinance authorizing the Des Moines City Railway Company to use its railway tracks and cars

for carrying United States mail, express and freight, and for carrying materials for the construction and operation of its road. (Exhibit 151, record page 292.) This ordinance contained the following provision, in Section 8. (Record, page 294):

"Nothing in this ordinance contained shall be so construed as to extend the charters of any of the companies operated by the Des Moines City Railway beyond the time as fixed in their original charters, and if the charters of any of the said companies expire before eight years, then all rights granted by this ordinance shall also expire at the same time."

The grant contained in the ordinance was for a period of eight years. The only franchise which, under any possible construction could have expired within eight years, was the franchise granted September 10th, 1866, and which the company is now claiming the city has recognized as perpetual. This franchise, under the construction contended for by the appellant, expired January 1st, 1898, and Section 8 of the ordinance of February 4, 1895, could have referred to no other ordinance. It would seem, therefore, that the city council of the city of Des Moines, instead of recognizing that the ordinance of 1866 granted a perpetual right, expressly declared in the ordinance of 1895 that it was their opinion that it might expire within eight years from 1895, which expressly negatives the claim of the appellee that the city has always recognized the Turner franchise as a valid and existing contract, perpetual in terms. The reference in Section 8 of this ordinance of 1895 could not have been more explicit if it had referred to the ordinance of 1866 by its title, since all of the other franchises granted, both by the city of Des Moines and the suburban towns adjacent thereto, were granted between the years 1885 and 1890, and none of them were granted for a period shorter than 25 years, so that by no possible construction could the term of any of them expire within eight years from 1895, while the franchise of 1866 would expire, under the construction claimed by the appellant, within three years.

So far as the paving is concerned and the requirement by the city of Des Moines that the company pay a portion of the cost of paving streets, and pay to the property owners a portion of the value of the paving upon the streets upon which it should enter which were already

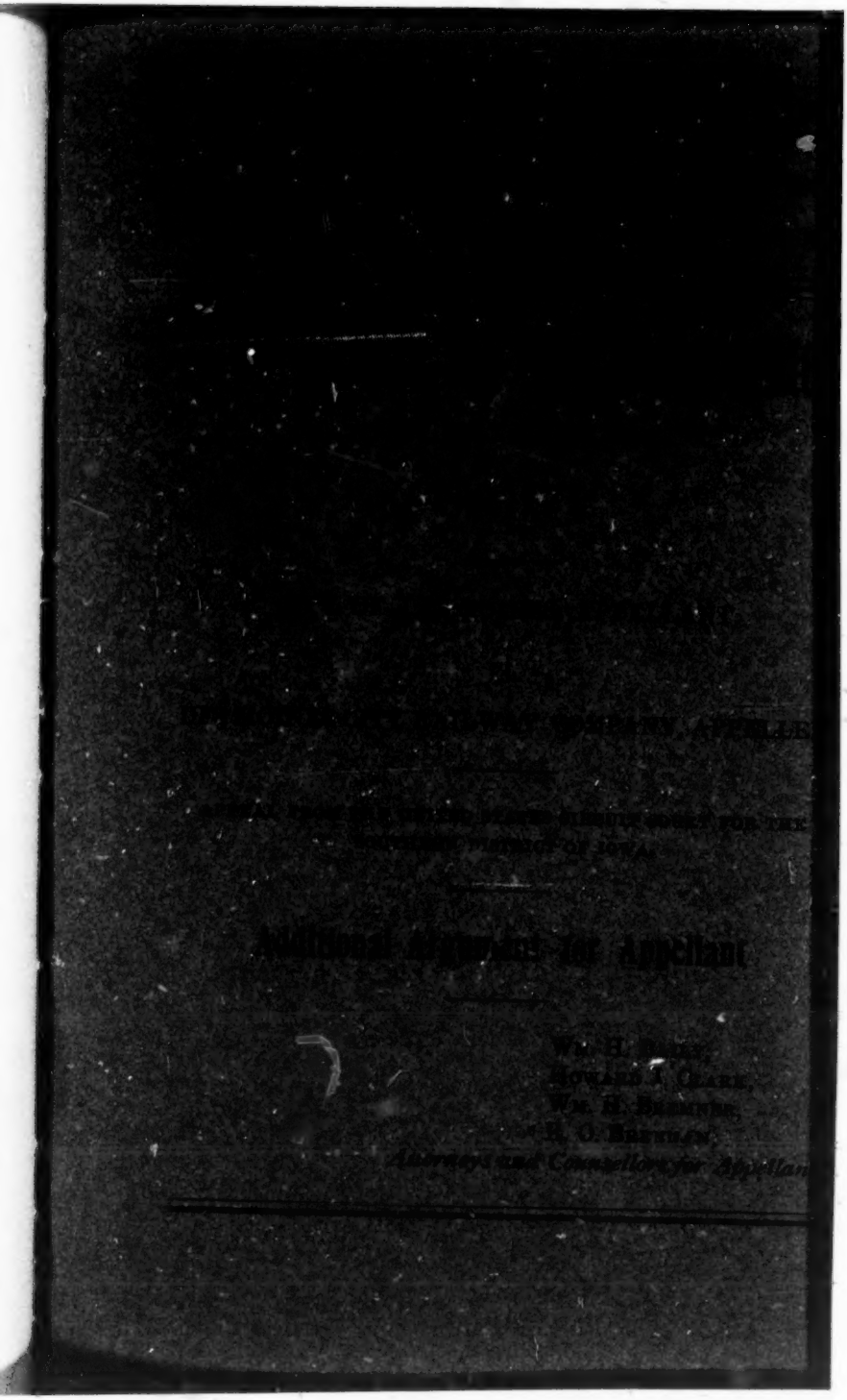
paved, this was a matter concerning which the council had no option. The Street Railway Company was a fact. It was operating in the city of Des Moines and was occupying the streets of the city with its tracks. *Section 831 of the Code of Iowa* provides:

"All railway and street railway companies shall be required to make, reconstruct and repair all paving, graveling or macadamizing between the rails of their tracks, and one foot outside thereof, at their own expense, unless by ordinance of the city, or by virtue of the provisions or conditions of any ordinance of the city under which said railway or street railway may have been constructed or may be maintained it may be bound to pave, gravel, or macadamize other portions of said street * * *."

And it is provided by *Section 835 of the Code of 1897* that "Before any street railway company shall lay its tracks upon any street that has been paved, and which at the time is not being re-paved, it shall pay into the city treasury the value of all paving between its tracks and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street, in proportion to the amounts originally assessed against the property abutting thereon."

It was the legislature of Iowa that compelled the street railway company to pay for paving. The city council of the city of Des Moines simply carried out the provisions of the statute, and attention is called to the fact that the city has always insisted that the street railway company was required to pave between the rails and one foot outside thereof on all streets which were being newly paved, while the provisions of the ordinance of 1866 is to the effect that it was only to be required to pay for the paving between the rails. (Sec. 4, Exhibit A, record page 19.) It is true that the city contended that even if the ordinance of 1866 was in force, that none-the-less the street railway company was required to pay for the paving between the rails and one foot outside thereof because of the wording of the statute, but there was no recognition of the validity of the ordinance of 1866, or of any other ordinance as a contract valid and existing, in requiring the street railway company to pay for paving. This was a matter which was required by the state legislature. The railway company was actually occupying streets, and whether occupying them with or without authority of the city of Des Moines, the statutes of the state required that it pay for the paving. The city officers of the city of Des Moines

have never directly or indirectly placed the construction upon the ordinance of 1866 contended for by the appellee. Everything that they have done is just as consistent with the recognition of the existence of other franchises as the existence as a valid contract of the ordinance of 1866. As a matter of fact none of the acts of the city recognized any of the franchises claimed by the Des Moines City Railway Company as valid and existing contracts. The city council and other officers of the city simply treated the street railway company as an existing fact and dealt with it accordingly.

For the reasons pointed out, we respectfully submit that this cause should be reversed.

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